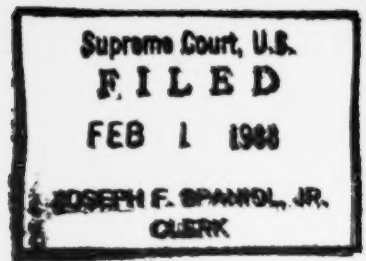


87-1302



No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN GUSHIKEN, RODNEY KIM AND
NICK TEVES, JR., IN THEIR
RESPECTIVE CAPACITIES AS EMPLOYER
TRUSTEES OF THE PECA-IBEW VACATION
& HOLIDAY SUPPLEMENTARY UNEMPLOYMENT
BENEFIT, AND ANNUITY FUNDS,

Petitioners,

v.

THOMAS FUJIKAWA, IN HIS CAPACITY AS
UNION TRUSTEE OF THE PECA-IBEW
VACATION & HOLIDAY, SUPPLEMENTARY
UNEMPLOYMENT BENEFIT,
AND ANNUITY FUNDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a claims procedure established and maintained in an employee benefit plan pursuant to the Employee Retirement Income Security Act of 1974, and its implementing regulations must be exhausted before suit is filed, where the claim for benefits ultimately relies on interpretation and application of the plan documents.

2. Whether a deadlock procedure established and maintained in a joint employer-union employee benefit plan pursuant to the Taft Hartley Act must be exhausted before suit is filed, where the claim for benefits ultimately relies on interpretation and application of the plan documents.

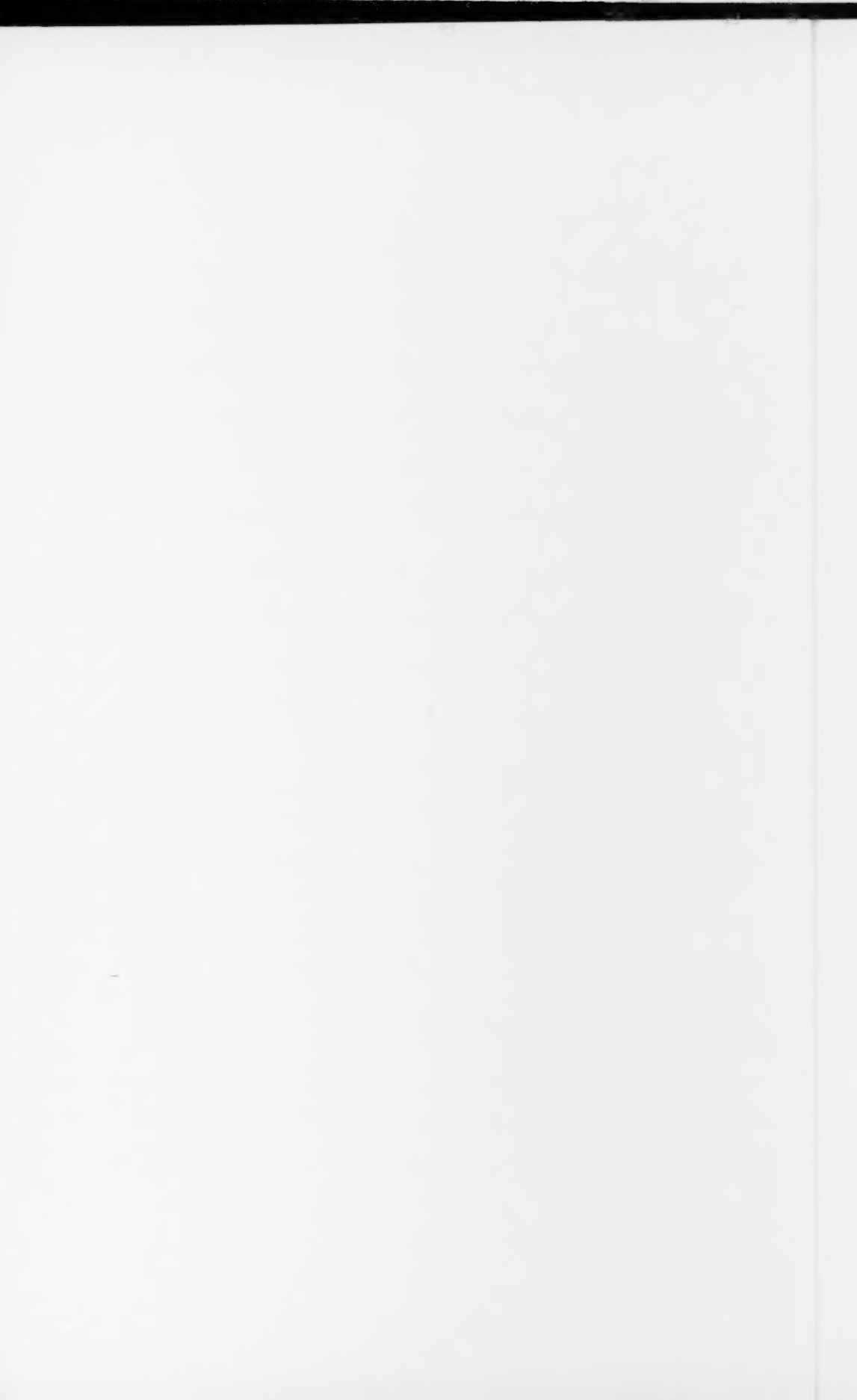


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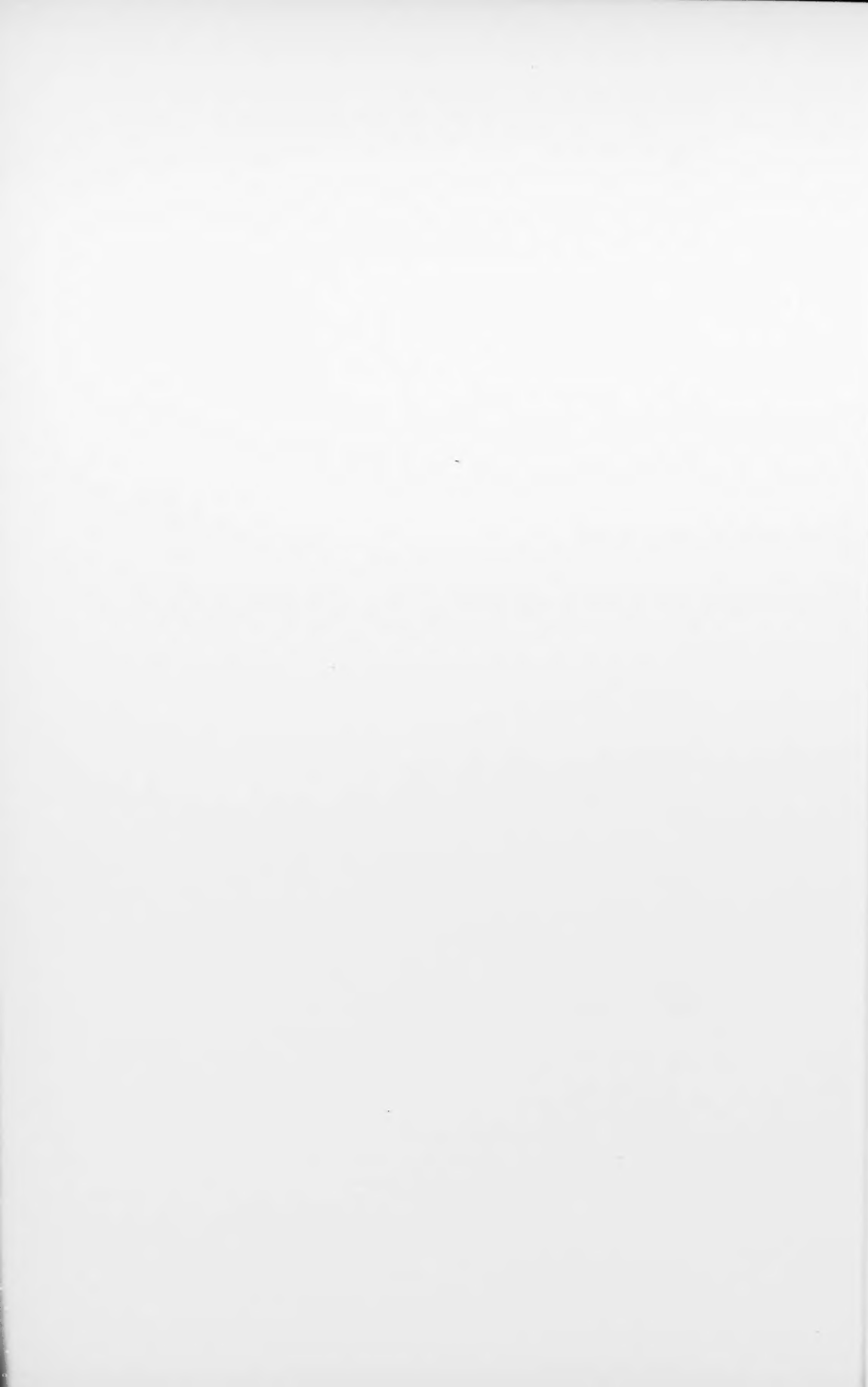


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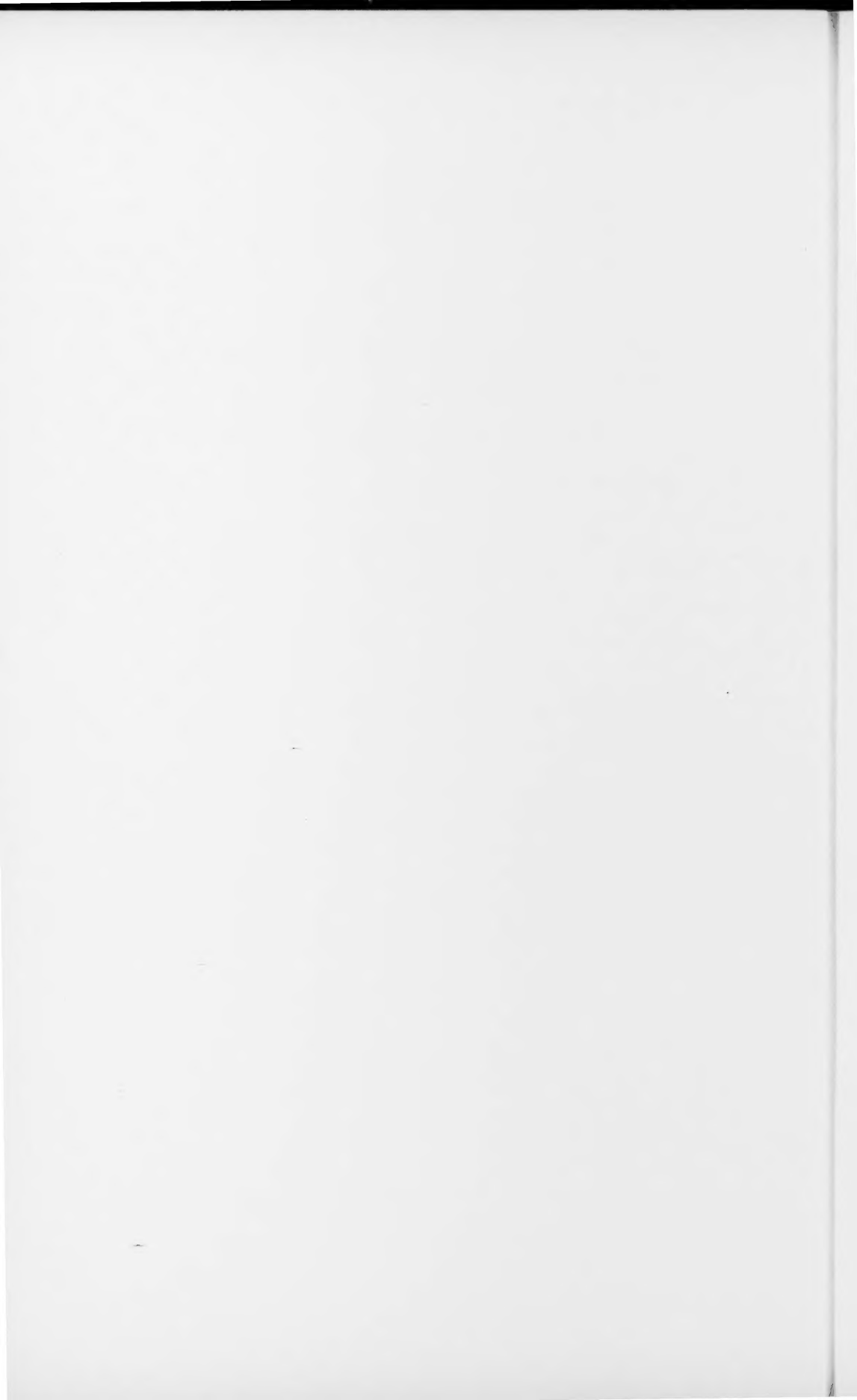
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN GUSHIKEN, RODNEY KIM AND
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RESPECTIVE CAPACITIES AS EMPLOYER,
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BENEFIT, AND ANNUITY FUNDS,

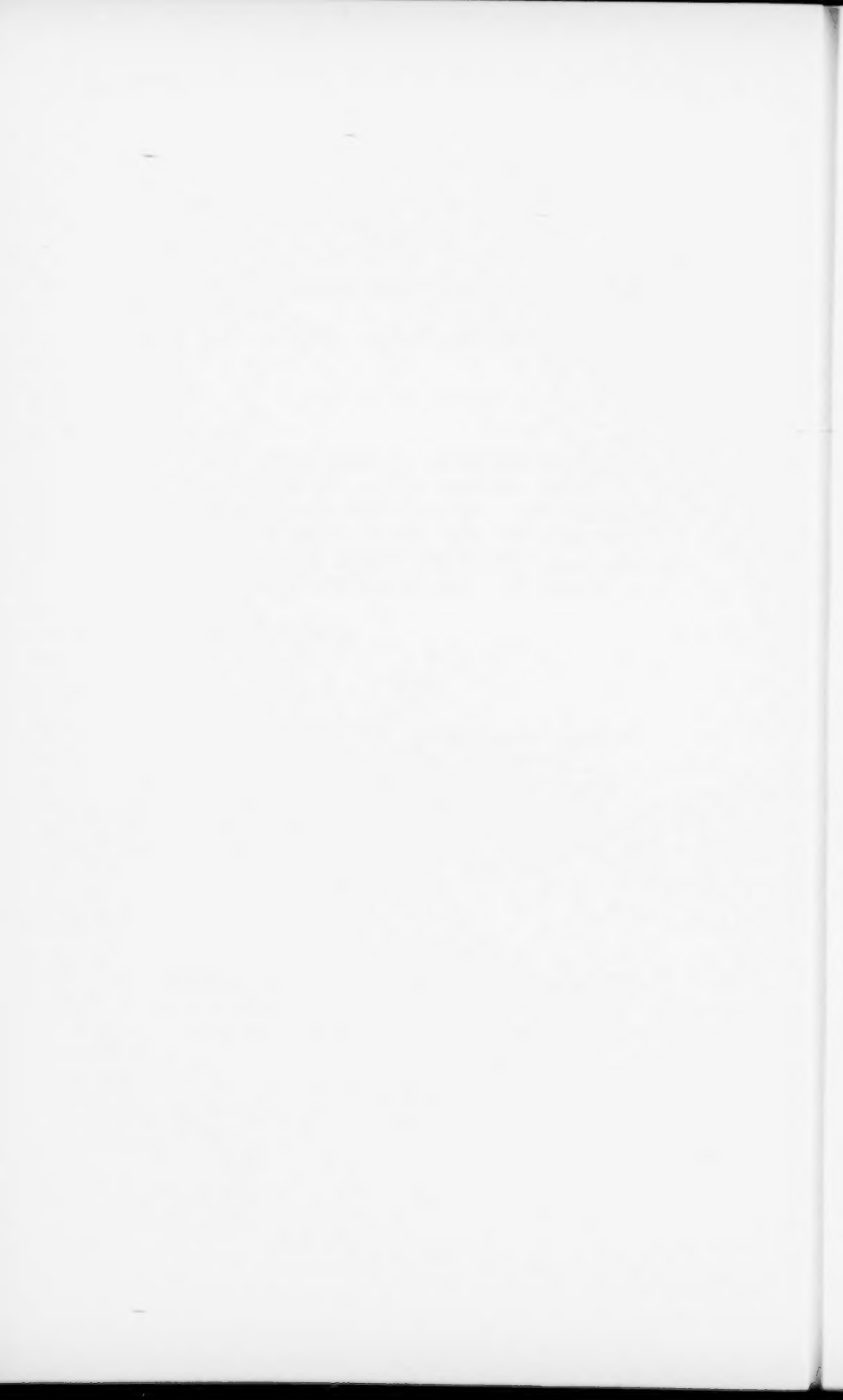
Petitioners,

v.

THOMAS FUJIKAWA, IN HIS CAPACITY
AS UNION TRUSTEE OF THE
PECA-IBEW VACATION & HOLIDAY,
SUPPLEMENTARY UNEMPLOYMENT
BENEFIT, AND ANNUITY FUNDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT



Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 823 F.2d 1341, and is reproduced in Appendix A, A-1 - A-39. The Opinion of the District Court is unreported, and is reproduced in the Appendix B, A-40 - A-43.

JURISDICTION

The Judgment of the Court of Appeals reversing the Judgment of the District Court was entered on July 30, 1987. Petitioners filed a timely Petition For Rehearing and Suggestion

For Rehearing En Banc on August 13, 1987. The Petition For Rehearing was denied by an Order filed on November 2, 1987, which is reproduced in the Appendix C, A-44. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATION INVOLVED

The relevant parts of the following statutes and regulation are reproduced in Appendix D, A-45 - A-92:

Section 102(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1022(b); Section 404 of ERISA, 29 U.S.C. §1104; Section 502 of ERISA, 29 U.S.C. §1132; Section 503 of ERISA, 29 U.S.C. §1133; Section 510 of ERISA, 29 U.S.C. §1140; Section 514 of ERISA, 29

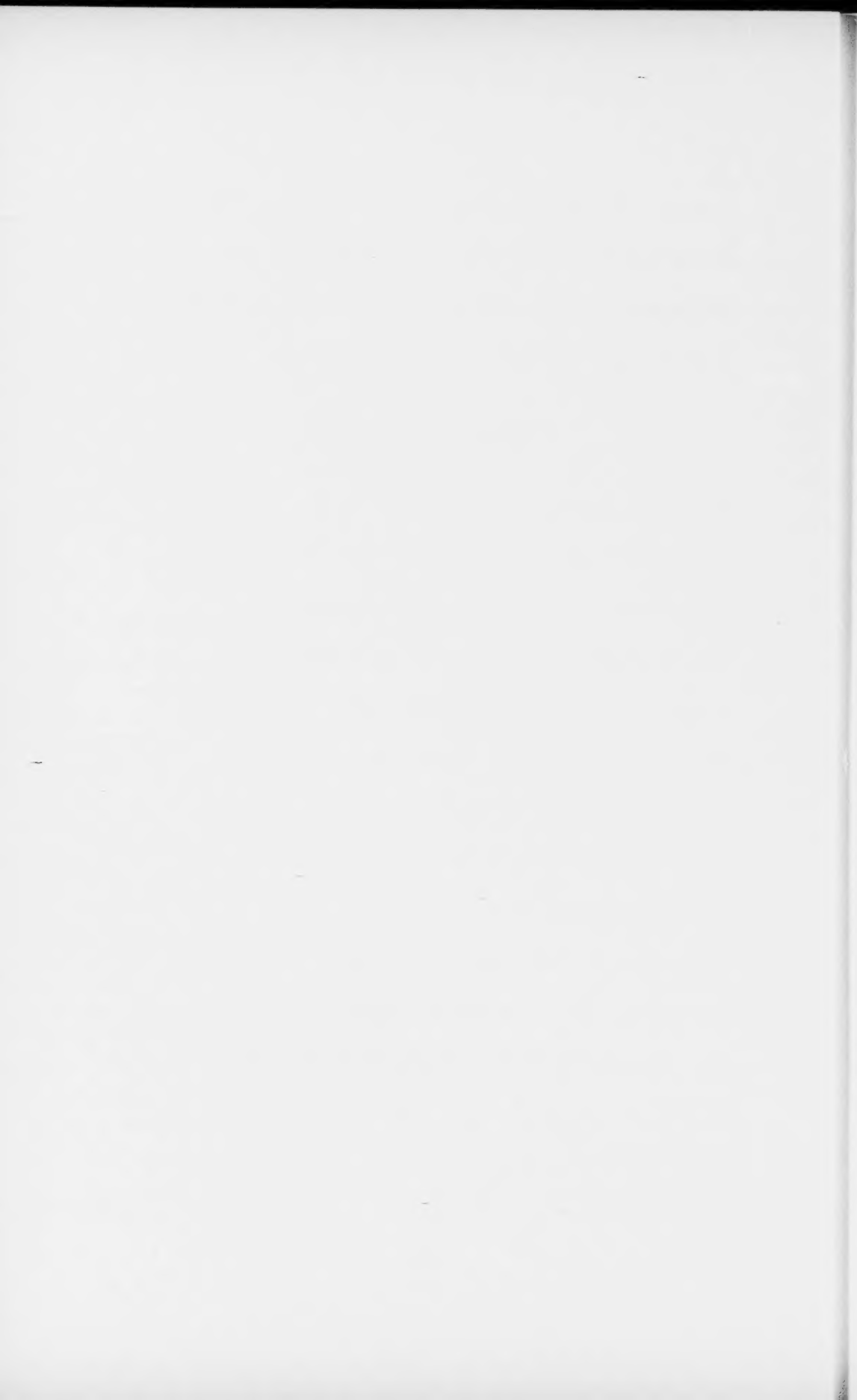
U.S.C. §1144; Section 302 of the Taft Hartley Act of 1947, as amended ("Taft Hartley Act"), 29 U.S.C. §186; and 29 C.F.R. §2560.503-1 (1987).

STATEMENT OF CASE

A. The Facts

This case involves the PECA-IBEW Vacation and Holiday, Supplemental Unemployment Benefit, and Annuity Plans ("Plans"). The Plans are employee benefit plans covered by ERISA, and joint union-employer employee benefit plans covered by the Taft-Hartley Act.

The documents governing the Plans provide the claims procedure required by ERISA, and the deadlock procedure



required by the Taft Hartley Act,
supra.^{1/}

The Plan documents also provide that the Plans "shall be used solely for the purpose of providing benefits [...] to employees". They define "employee" as a "person employed by an Employer under a labor agreement with the Union", and an "Employer" as an entity which "is party to a labor agreement with the Union".^{2/}

1/ The claims and deadlock procedures for the Supplemental Unemployment Plan are reproduced in Appendix E, A-93 - A-100. They are similar to the procedures for the other plans. The claims procedure provides that it must be exhausted before suit is filed. See A-93.

2/ The relevant provisions of the Supplemental Unemployment Plan documents and are reproduced in the Appendix F, A-101 - A-103. They are similar to those for the other Plans.



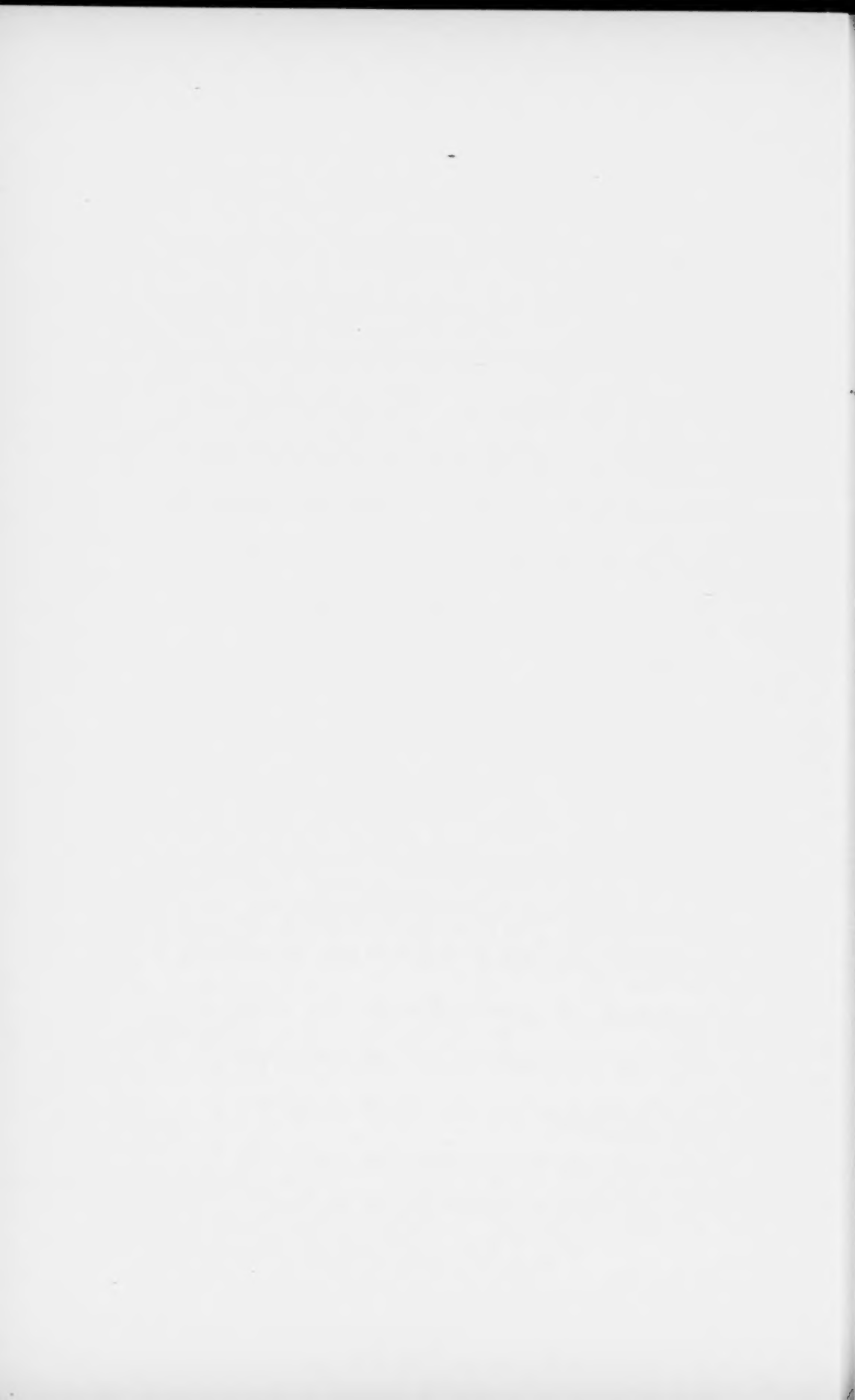
Respondent Thomas Fujikawa

("Fujikawa") is the Business Manager and Financial Secretary of Local Union No. 1186, International Brotherhood of Electrical Workers, AFL-CIO ("Union"). He is also a participant in, and one of three trustees selected by his Union for, each of the Plans.

Petitioners John Gushiken, Nick Teves, Jr. and Rodney Kim ("Gushiken et al.") are some of the trustees selected by the employers for the Plans.

The labor agreement between the Union and some of the employers expired in 1984. The Plans received hundreds of applications for over a million dollars worth of benefits.

Gushiken et al. continued to approve applications for persons



employed by employers whose labor agreement had not expired, whether or not these people were on strike.

However, they did not vote to approve payment of benefits to persons employed by employers whose labor agreement had expired, because these persons no longer appeared to be "employed by an Employer under the labor agreement with the union", as required by the Plan documents.

B. The Court Proceedings

Fujikawa immediately filed suit alleging that Gushiken, et al. violated the Plan documents and thereby Section 404 of ERISA, 29 U.S.C. §1104, by not voting to approve payment of benefits for persons employed by employers whose labor agreement had expired. The Complaint



demanded that Gushiken et al. sign and issue checks for all benefits. It invoked jurisdiction pursuant to Section 502 of ERISA, 29 U.S.C. §1132, and 28 U.S.C. §1331.

Fujikawa's claim for the benefits ultimately relied on interpretation and application of the Plan documents. Under Fujikawa's theory, if the persons employed by employers whose labor agreement had expired were not "employed by an Employer under the labor agreement with the union", Gushiken et al. did not violate Section 404 of ERISA, supra.

Gushiken et al. therefore filed a motion for summary judgment dismissing the action because Fujikawa failed to exhaust the claims procedure in the Plan documents.

The United States District Court for the District of Hawaii entered



summary judgment in favor of Gushiken et al. dismissing Fujikawa's suit because he failed to exhaust the claims procedures.

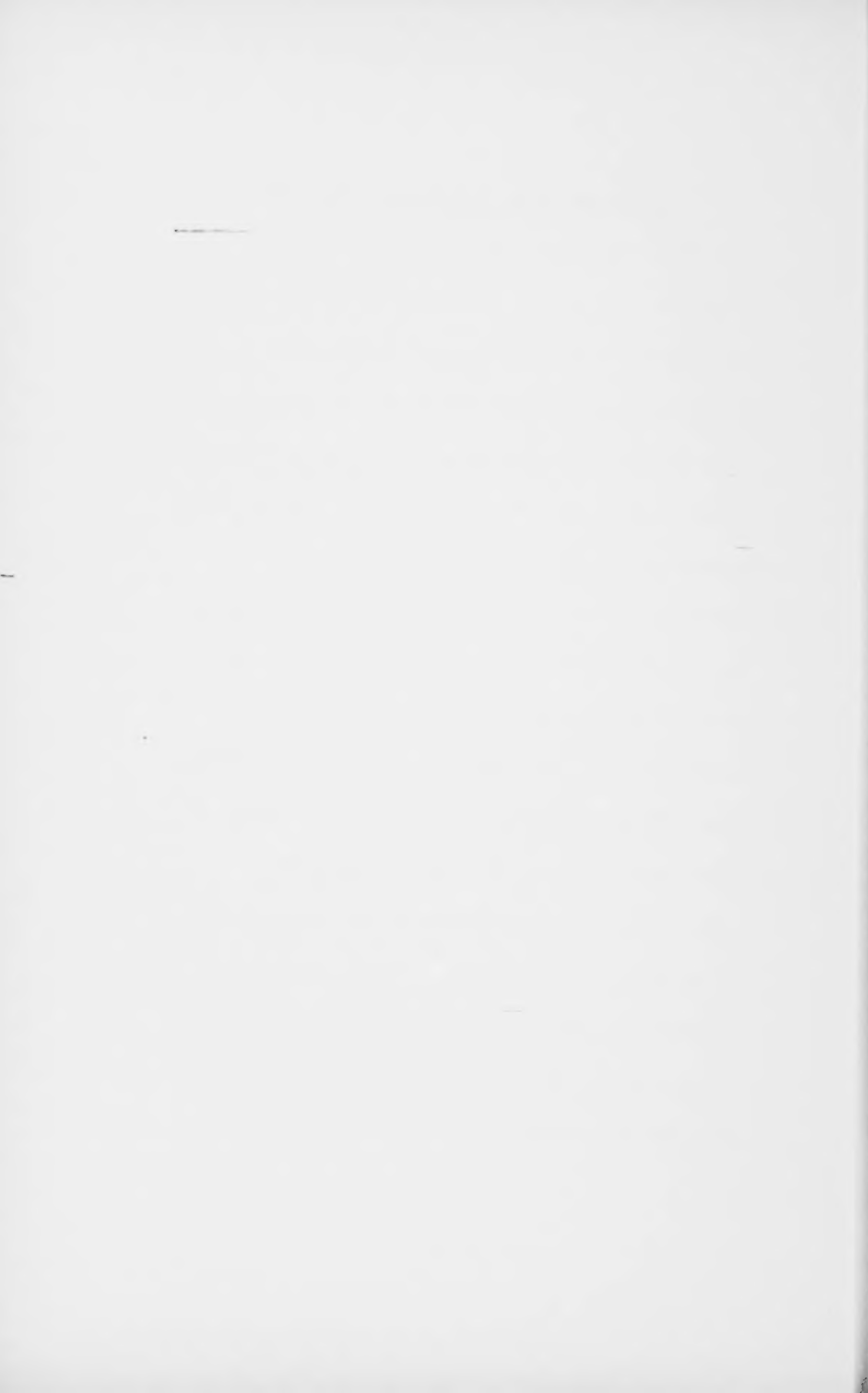
Fujikawa appealed to the Ninth Circuit Court of Appeals.

Gushiken et al. contended that the Court of Appeals should affirm the District Court's Judgment, because Fujikawa failed to exhaust the claims and deadlock procedures provided in the Plan documents before filing suit.

The Court of Appeals reversed the Judgment of the District Court and denied the Petition For Rehearing and Suggestion For Rehearing En Banc holding that Fujikawa could evade the exhaustion requirement by simply alleging that a violation of the Plan documents also violates Section 404 of ERISA, supra.

REASONS FOR ALLOWING THE WRIT

The Opinion of the Court of Appeals directly conflicts with the decisions of the other Courts of Appeals requiring exhaustion of claims and deadlock procedures before filing suit. The Opinion also conflicts with a decision of this Court that exhaustion of a contractual procedure is required when the claim ultimately relies on interpretation and application of the contract. Further, the Opinion conflicts in principle with decisions of the Courts of Appeals on the standard of review of trustees' decisions. Finally, it is important to resolve these conflicts because of their effect on many plans and participants, and implication to



ERISA's legislative history and statutory goals.

A. Direct Conflict With Other Circuit Courts Of Appeal On The Question Whether The Claims Procedure Must Be Exhausted Before Suit

Section 503 of ERISA, supra, requires every employee benefit plan to establish and maintain a claims procedure according to regulations of the Secretary of Labor. 29 C.F.R. §2560.503-1 sets out minimum requirements for the claims procedure.^{3/} Section 102(b) of ERISA, supra, requires the plan description and summary plan description to describe the claims procedure. Section 404(a)(1)(D) of

3/ See, Pilot Life Insurance Company v. Dedeaux, 481 U.S. ___, 95 L.Ed.2d 39, 50-51, 107 S.Ct. 1549 (1987), Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134, 143-144, 87 L.Ed.2d 96, 104-105, 105 S.Ct. 3085 (1985).

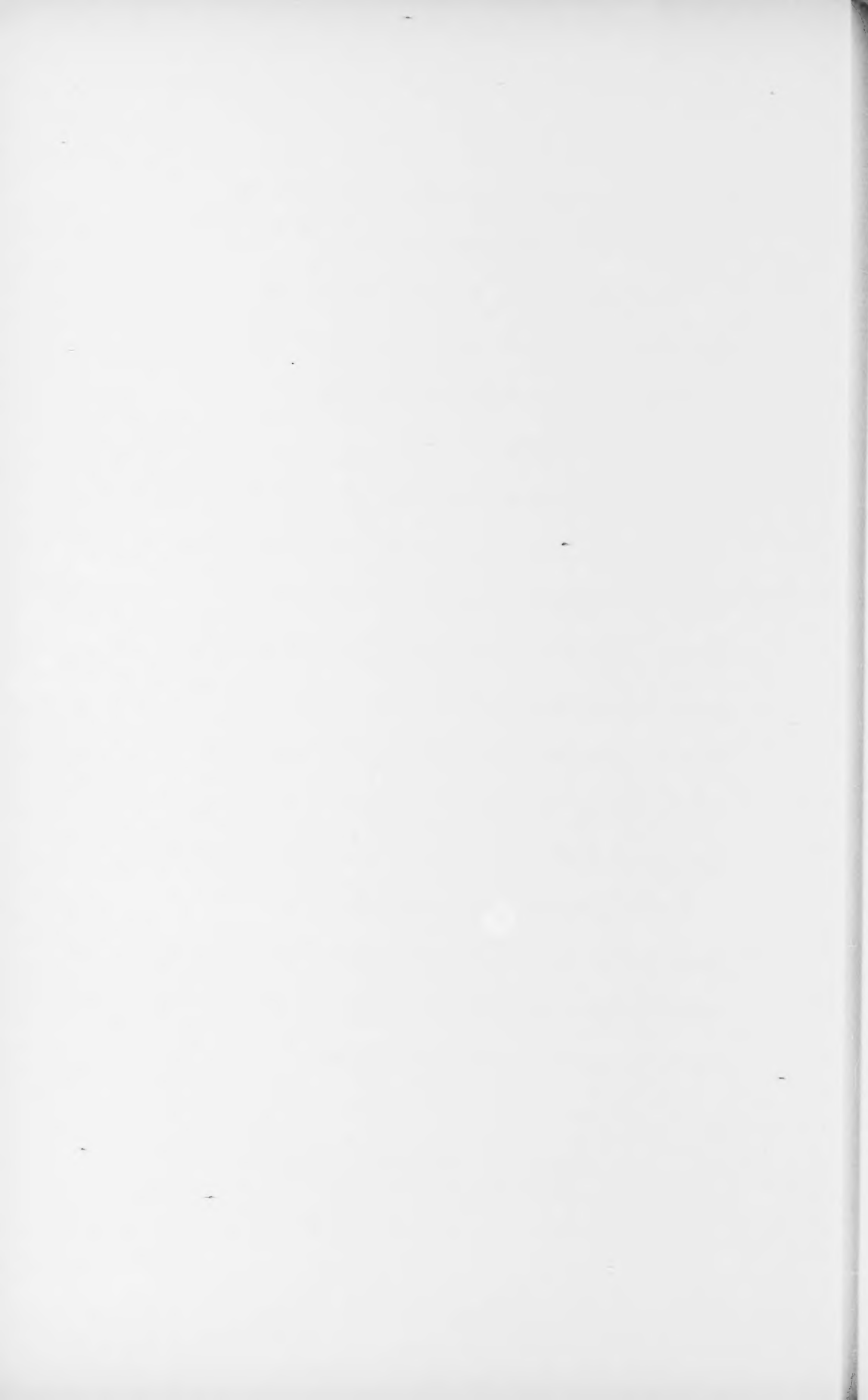


ERISA, supra, requires trustees to comply with plan documents.

The decision of the Court of Appeals in this case directly conflicts with the decisions of other Courts of Appeals on the question whether a claims procedure established and maintained in an employee benefit plan pursuant to above sections of ERISA and its implementing regulations must be exhausted before suit is filed, where the claim for benefits ultimately relies on interpretation and application of the plan documents.

The Courts of Appeals other than the Ninth Circuit have concluded that the claims procedure must be exhausted before such a suit is filed.^{4/}

^{4/} Delgrosso v. Spang & Company, 769 F.2d 928, 932 (3rd Cir. 1985),



Some of these Courts of Appeal have concluded that the claims procedure must be exhausted before suit is filed even where the claim involves only interpretation and application of a substantive standard of ERISA--such as a claim alleging discrimination or retaliation in violation of Section

4/ Cont.

cert. denied, ___ U.S. ___, 90 L.Ed.2d 692, 106 S.Ct. 2246 (1986), Barrowclough v. Kidder, Peabody & Co. Inc., 752 F.2d 923, 939-941 (3rd Cir. 1985), Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276 (3rd Cir. 1984), Wolf v. National Shopmen Pension Fund, 728 F.2d 182, Denton v. First National Bank of Waco Texas, 765 F.2d 1295, 1300-1304 (5th Cir. 1985), Challenger v. Local 1, International Bridge, Structural & Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980), Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980), Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985), cert. denied 474 U.S. 1087, 106 S. Ct. 863, 88 L. Ed. 2d 902 (1986).



510 of ERISA, supra.^{5/} Other Courts of Appeal have concluded that the claims procedure must be exhausted before suit is filed only where the claim ultimately relies on interpretation and application of the plan documents--such as the claim alleging violation of the plan documents and thereby Section 404 of ERISA, supra, in this case--but need not be exhausted where the claim

^{5/} Kross v. Western Electric Company, 701 F. 2d 1238, 1243-1245 (7th Cir. 1981), Mason v. Continental Group, Inc., 763 F. 2d 1219, 1224-1227 (11th Cir. 1985), cert. denied 474 U.S. 1087, 106 S. Ct. 863, 88 L. ed. 2d 902 (1986). There is more reason to hold that the claims procedure need not be exhausted in these cases than where the claim ultimately relies on interpretation and application of the plan documents. The substantive standards of ERISA apply without regard, or only after, interpretation and application of the plan documents shows a right to benefits.



only involves interpretation and application of the substantive standards of ERISA.^{6/}

However, only the Ninth Circuit Court of Appeals in this case has concluded that a claims procedure established and maintained pursuant to ERISA and its implementing regulations need not be exhausted before suit is filed regardless of whether the claim ultimately relies on interpretation and application of the plan documents

^{6/} Gavalik v. Continental Can Company, 812 F.2d.834, 849 (3rd Cir. 1987), Zipf v. American Telephone & Telegraph, 799 F.2d 889, 891 (3rd Cir. 1986), Delgrosso v. Spang & Company, 769 F.2d 928, 932 (3rd Cir. 1985), cert. denied, ___ U.S. ___, 90 L.Ed.2d 692, 106 S.Ct. 2246 (1986), Barrowclough v. Kidder, Peabody & Co. Inc., 752 F.2d 923, 939-941 (3rd Cir. 1985), Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276 (3rd Cir. 1984).



or interpretation and application of the substantive standards of ERISA.

B. Direct Conflict Between Second and Ninth Circuit Courts Of Appeal On The Question Whether The Deadlock Procedure Must Be Exhausted Before Suit Is Filed

Section 302(c)(5)(B) of the Taft Hartley Act, supra, requires every joint employer-union employee benefit plan to establish and maintain a deadlock procedure to resolve disputes between employer and union trustees.

The decision of the Court of Appeals in this case directly conflicts with the decision of the Second Circuit Court of Appeals in Alfarone v. Bernie Wolff Construction Corp., 788 F.2d 76 (2nd Cir.) cert. denied __ U.S. __, 93 L.Ed.2d 289, 107 S.Ct. 316, (1986) on the question whether a deadlock procedure

established and maintained in a joint employer-union employee benefit plan pursuant to the Taft-Hartley Act must be exhausted before a suit is filed, where the claim for benefits involves interpretation and application of the plan documents.

The Second Circuit has concluded that the deadlock procedure must be exhausted before suit is filed, even where the claim involves interpretation and application of the substantive standards of ERISA.

Alfarone v. Bernie Wolff Construction Corp., supra. On the other hand, the Ninth Circuit has concluded in this case the deadlock procedure need not be exhausted, even where the claim ultimately relies on interpretation and application of the plan documents.



C. Conflict In Principle With
Decision Of This Court On Question
Whether Exhaustion Of Contractual
Procedure Is Required When Claim
Ultimately Relies On
Interpretation And Application Of
The Contract

The decision of the Ninth Circuit Court of Appeal in this case also conflicts in principle with the decision of this Court in Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1979). The Court in Barrentine recognized that deferral to the contractual arbitration procedure would have been appropriate if the claim had ultimately relied on interpretation and application of the contract. Barrentine v. Arkansas-Best Freight Systems, Inc., supra, 450 U.S. at 737-738, 67 L. Ed. 2d at 651-652. By parity of reasoning, exhaustion of



the claims procedure is appropriate where the claim ultimately relies on interpretation and application of plan documents.

D. Conflict In Principle With
Decisions Of Courts Of Appeals On
Standard Of Review For Trustee
Decisions

The Courts of Appeals have concluded that the arbitrary and capricious standard applies to review of benefit decisions by trustees of employee benefit plans concerning interpretation and application of plan documents.²⁴

²⁴ Baker v. Lukens Steel Corp., 793 F.2d 509 (3rd Cir. 509), Witmeyer v. Kilroy, 788 F.2d 1021 (4th Cir. 1986) — Cook v. Pension Plan For Salaried Employees Of Cyclops Corp., 801 F.2d 865, Denton v. First National Bank of Waco Texas, 765 F.2d 1295, 1300-1304 (5th Cir. 1985) (6th Cir. 1986), Brown v. Retirement Committee of Briggs & Stratton, 797 F.2d 521 (7th Cir. 1986), cert. denied ___ U.S. ___, 107 S.Ct. 1311, 94 L.Ed.2d 165 (1987), Niagra of Wisconsin Paper Corporation

The decision of the Ninth Circuit Court of Appeals in this case conflicts in principle with these decisions.^{8/} Concluding that the claims and deadlock procedures need not be exhausted before suit is filed does not permit trustees to make an informed decision, much less afford

7/ Cont.

v. Paper Industry Union-Management Pension Fund, 800 F.2d 742 (8th Cir. 1986), Moore v. Provident Life & Accident Insurance Company, 786 F.2d 922 (9th Cir. 1986), Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302 (9th Cir. 1986), Dockray v. Phelps Dodge Corporation, 801 F.2d 1149 (9th Cir. 1986), Stewart v. National Shopmen Pension Fund, 795 F.2d 1079 (D.C.Cir. 1986)

8/ See, Denton v. First National Bank of Waco Texas, 765 F.2d 1295, 1300-1304 (5th Cir. 1985), Mason v. Continental Group, Inc., 763 F. 2d 1219, 1227 (11th Cir. 1985), cert. denied 474 U.S. 1087, 106 S. Ct. 863, 88 L. Ed. 2d 902 (1986).

them the arbitrary and capricious standard of review. This conclusion permits participants and fellow trustees to present their evidence and argument to the court, and disclose it to the trustees only by discovery under the Federal Rules of Civil Procedure.

E. Importance Of Resolving Conflict

- 1) The Conflicts Concerning Exhaustion Affect Many Plans And Their Participants

There were approximately 900,000 employee benefit plans filing annual reports in 1985. Central States Pension Fund v. Central Transport, 472 U.S. 559, 578, 86 L.Ed.2d 447, 463, 105 S.Ct.2833 (1985). There were an estimated 112,024,000 participants in these plans at that time.^{2/} All of

^{2/} Statistical Abstract Of The United States at 405, Table Number 686 (1987).



these plans and participants are affected by the important questions concerning which forum initially decides contractual claims for benefits.

2) The Conflicts Concerning Exhaustion Implicate ERISA's Legislative History And Statutory Goals

The Court denied a petition for a writ of certiorari in John Mason et al. v. Continental Group, Inc., 474 U.S. 1087, 106 S.Ct. 863, 88 L.Ed.2d 902 (1986) seeking to resolve the conflict among the circuits on the question whether the claims procedure must be exhausted where the claim involves interpretation and



application of substantive standards
of ERISA.^{10/} However, the question
involved in this case -- whether the

10/ Justice White, joined by Justice Brennan, dissented and explained: "I believe that the Court should grant certiorari in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than one state--and, no doubt, in more than one judicial circuit--differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum-shopping by plaintiffs. Accordingly, the conflict among the circuits over the issue of an exhaustion requirement under ERISA can hardly be passed over as an unimportant one unworthy of this Court's attention. I therefore dissent from the denial of certiorari." Id.



claims procedure must be exhausted where the claim ultimately relies on interpretation and application of the plan documents -- has an impact broader than the question involved in Mason. Claims ultimately relying on interpretation and application of the plan documents arise more often than claims involving only interpretation and application of the substantive standards of ERISA. Moreover, the reasons for requiring exhaustion for claims ultimately relying on interpretation and application of the plan documents implicate ERISA's legislative history and statutory goals.

a. Legislative History

ERISA's legislative history shows that Congress intended to require



exhaustion of the internal procedures where the claim for benefits ultimately relies on interpretation and application of the plan documents. The Conference Report provides that benefit claims involving interpretation and application of plan documents "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."^{11/} Exhaustion of integral procedures has long been the rule in section 301 actions. Moreover, Section 514(d) of ERISA, supra, provides that ERISA does not supersede other federal law. Existing federal

^{11/} H.R. REP NO. 1280, 93rd Cong., 2nd Sess. 327 (Conference Report), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5017.



labor law establishes a policy of great judicial deference to internal resolution of disputes.^{12/}

b. Statutory Goals

In addition to ERISA's legislative history, ERISA's statutory scheme demonstrates that Congress intended to require exhaustion of the internal procedures where the claim ultimately relies on interpretation and application of the plan documents.

By imposing claims procedures under Section 503 of ERISA, supra, Congress hoped to reduce the number of frivolous lawsuits concerning benefit claims, promote consistent treatment

^{12/} Manley, Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral Or Intrafund Remedies?, 71 CORN. L. REV. 952, nn. 80-84 (1986)



of such claims, provide a nonadversarial forum to decide them, and minimize settlement costs. Filtering benefit claims through the procedure furthers these goals. It also reduces the number of lawsuits concerning benefit claims, easing the burden on crowded courts. Requiring exhaustion ensures that the benefits Congress envisioned will accrue. It would be anomalous if the same good reasons that led Congress to require plans to provide initial procedures did not lead the Court to see that those procedures are regularly used.^{13/}

By imposing broad fiduciary obligations on plan trustees under

^{13/} Manley, supra, 71 CORN. L. REV. 952, nn. 85-88 (1986)



Sections 402 through 412 of ERISA, 29 U.S.C. §§1102 through 1112, Congress hoped to encourage them to assume more responsibility for management of their plans. Requiring exhaustion of internal procedures serves this purpose by enhancing the trustees' ability to manage their plans efficiently and preventing premature judicial intervention into the determination of claims. It increases efficiency by sharpening disputes and developing a factual record should judicial review eventually be necessary.^{14/}

Congress hoped to keep the cost of employee benefit reform and growth within reasonable limits. Requiring

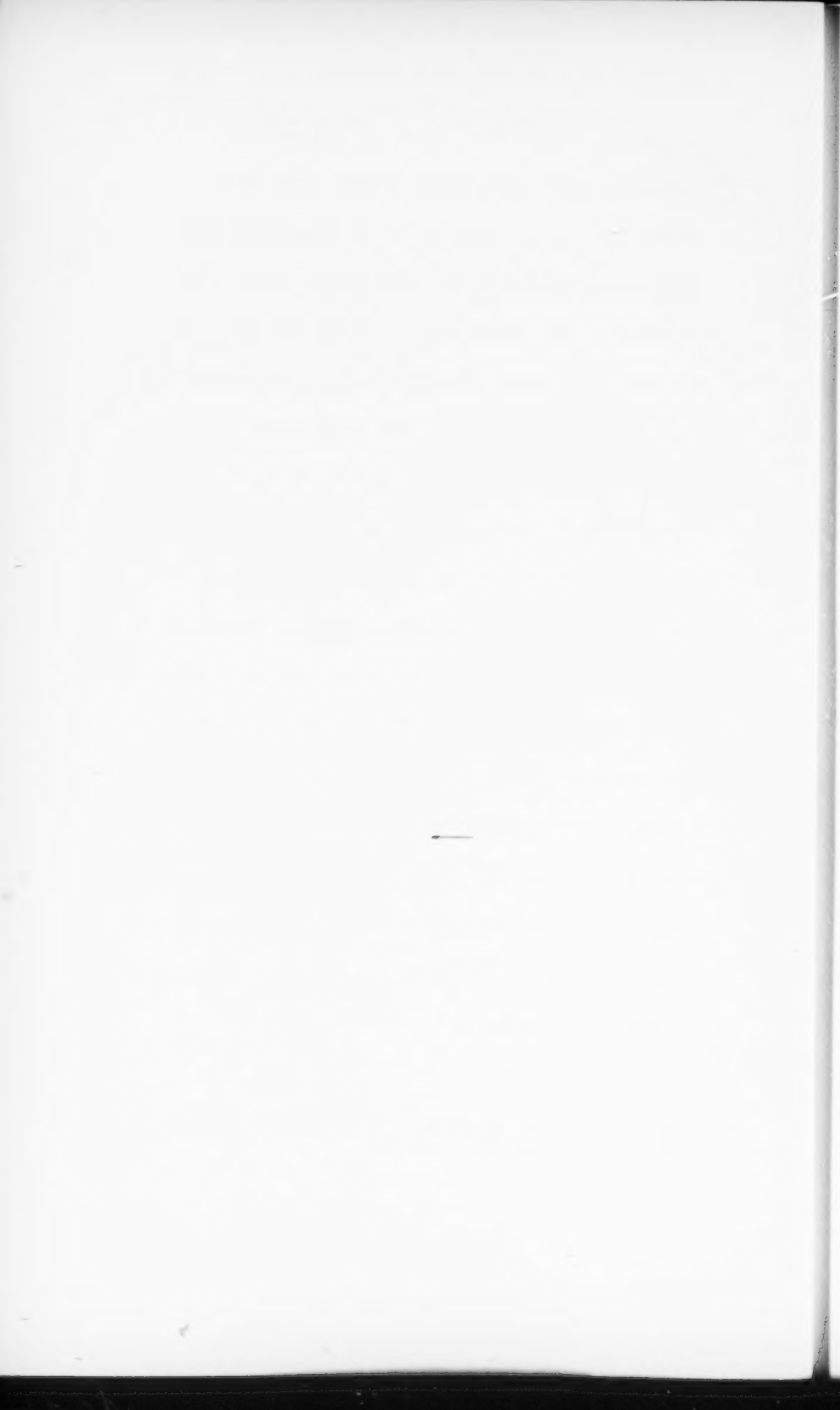
^{14/} Manley, supra, 71 CORN. L. REV. 952, nn. 89-91 (1986)



exhaustion achieves this aim by reducing litigation and thereby the expense of plan administration. If litigation of benefit claims before a final trustee decision is rendered is allowed, the costs of dispute settlement will increase markedly for employers and employees.^{15/}

By preempting state law under Section 514 of ERISA, supra, providing exclusive federal jurisdiction under Section 502(e)(1) of ERISA, supra, and allowing United States Department of Labor intervention in suits involving interpretation and application of the substantive standards of ERISA under 502(a)(5) of ERISA, supra, Congress hoped to ensure

^{15/} Manley, supra, 71 CORN. L. REV. 952, nn. 91-95 (1986)



uniform interpretation and application of the substantive standards of ERISA. On the other hand, by permitting concurrent state jurisdiction under Section 502(a)(1)(B) of ERISA, supra, and not allowing Department intervention in suits involving interpretation and application of plan documents under 502(a)(5) of ERISA, supra, Congress recognized that the goal of uniform interpretation and application of the substantive standards of ERISA did not require similar restrictions on suits involving interpretation and application plan documents.^{16/} The internal procedures in each plan designed to interpret and apply its

^{16/} Manley, supra, 71 CORN. L. REV. 952, nn. 124-131 (1986)]



own provisions will better achieve the contracting parties' intent.

CONCLUSION

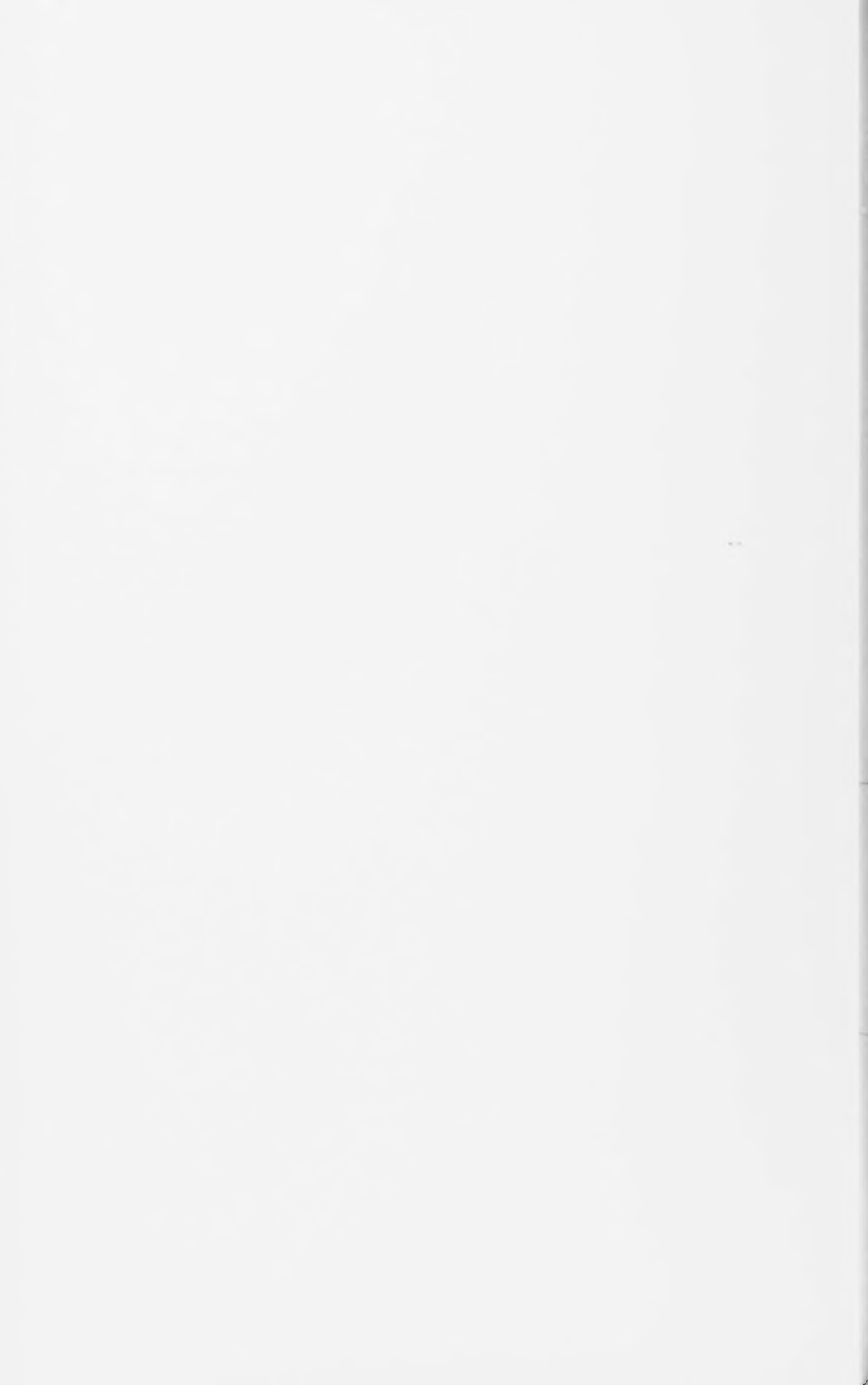
For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

TORKILDSON, KATZ, JOSSEM,
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Attorneys for
Petitioners John
Gushiken, Rodney Kim and
Nick Teves, Jr.



APPENDIX



APPENDIX A

823 F.2d 1341

THOMAS FUJIKAWA, in his capacity as a union trustee on the PECA-IBEW Vacation & Holiday, Supplementary Unemployment Benefit, and Annuity Funds,
Plaintiff-Appellant,

v. —

JOHN GUSHIKEN, Rodney Kim, and Nick Teves, Jr., in their respective capacities as employer trustees on the PECA-IBEW Vacation & Holiday, Supplementary Unemployment Benefit, and Annuity Funds,

Defendants-Appellees.

No. 85-1694

United States Court of Appeals
Ninth Circuit

Argued and Submitted Nov. 5, 1986
Decided July 30, 1987

Union trustee of multiemployer trust funds brought action against employer cotrustees, alleging breach of fiduciary duties under ERISA. On cross motions for summary judgment, the United States District Court for the District of Hawaii, Robert P. Aguilar, J., granted employer

trustees' summary judgment motion on theory that court did not have jurisdiction over case because union trustee had failed to exhaust internal administrative remedies as required by trust agreement and the Labor Management Relations Act. Union trustee appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) exhaustion of internal dispute procedure was not required where issue was whether violation of terms or provisions of ERISA had occurred; (2) exhaustion of internal dispute procedures was not required, given that union trustee essentially alleged that employer trustees were serving as representatives of multiemployer association and their individual businesses; (3) action would be remanded to district court for consideration of whether



decisionmaking process would be aided if dispute were to be submitted to umpire or whether district court should itself act; and (4) union trustee was entitled to award of attorney fees under ERISA section.

Reversed and remanded.

(1) 232Ak416.2 LABOR RELATIONS
k. Discharge and lay-off; wages and compensation. C.A.9 (Hawaii) 1987.

Exhaustion of internal dispute procedures was not required before bringing action where issue was whether violation of terms or provisions of ERISA had occurred, regardless of whether internal dispute procedure was established by contract or by virtue of statutory requirements of the Labor Management Relations Act. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; Labor



Management Relations Act, 1947, §1
et seq., 29 U.S.C.A. § 141 et seq.

(2) 232Ak416.2 LABOR RELATIONS
k. Discharge and lay-off; wages and
compensation. C.A.9 (Hawaii) 1987.

Union trustee's action against
employer cotrustees for alleged breach
of their fiduciary duties under ERISA
could be maintained without exhaustion
of internal dispute procedures, where
union trustee essentially alleged that
employer trustees were serving as
representatives of multiemployer
association and their individual
businesses. Employee Retirement
Income Security Act of 1974, § 2
et seq., 29 U.S.C.A. § 1001 et seq.;
Labor Management Relations Act, 1947,
§ 1 et seq., 29 U.S.C.A. § 141 et seq.

(3) 232Ak437 LABOR RELATIONS k.
Stay pending arbitration. C.A.9
(Hawaii) 1987.

Court may grant stay of ERISA
action pending arbitration only upon



receiving satisfactory assurance that arbitration proceedings will be instituted with reasonable promptness, where arbitration has not been instituted prior to court's decision on whether to stay proceedings pending arbitration. Employee Retirement Income Security Act of 1974, §2 et seq., 29 U.S.C.A. § 1001 et seq.

(4) 33k23.9 ARBITRATION k. Stay of proceedings pending arbitration. C.A.9 (Hawaii) 1987.

Where delay in judicial action in favor of arbitration proceedings would have adverse impact on statutory rights sought to be enforced or where strong considerations of public policy militate in favor of speedy judicial resolution, stay pending arbitration is generally inappropriate, but even in such circumstances, stay may be proper if court simultaneously provides interim relief which



adequately protects plaintiff's
interests.

(5) 33k23.9 ARBITRATION k. Stay
of proceedings pending arbitration.
C.A.9 (Hawaii) 1987.

Court should stay its own
proceedings in favor of arbitration
only when doing so would serve some
legitimate interest of parties or
court.

(6) 33k23.9 ARBITRATION k. Stay
of proceedings pending arbitration.
C.A.9 (Hawaii) 1987.

Before court stays its own
proceedings in favor of arbitration,
court should consider whether, under
all facts and circumstances of case,
deferring further judicial action
pending outcome of alternative dispute
resolution proceedings appears to be
the most appropriate action.

(7) 170Bk943 FEDERAL COURTS k.
Ordering new trial or other
proceeding. C.A.9 (Hawaii) 1987.

Action by union trustee for multiemployer trust funds against employer cotrustees alleging breach of fiduciary duties under ERISA would be remanded to district court, which should consider whether its decisionmaking process would be aided in any way if dispute were submitted to umpire and court were to receive copy of his decision, and district court could, in its discretion, refer matter to umpire or decide matter itself, where strike which led employer trustees to refuse to authorize payment of trust fund benefits to employees engaged in industry-wide strike was over, and presumably most, if not all, benefits had been paid. Employee Retirement Income Security Act of 1974, §2 et seq., 29 U.S.C.A. § 1001, et seq.



(8) 296k88 PENSIONS k. Costs and fees. C.A.9 (Hawaii) 1987.

Union trustee of multiemployer trust funds who brought action against employer cotrustees alleging breach of fiduciary duties under the Employee Retirement Income Security Act was entitled to award of attorney fees pursuant to ERISA section. Employee Retirement Income Security Act of 1974, §502(g), 29 U.S.C.A. §1132(g)(1).

Thomas P. Gill, Arlette S. Harada, Gill Park Park & Kim, Honolulu, Hawaii, for plaintiff-appellant.

Jeffrey S. Harris, Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

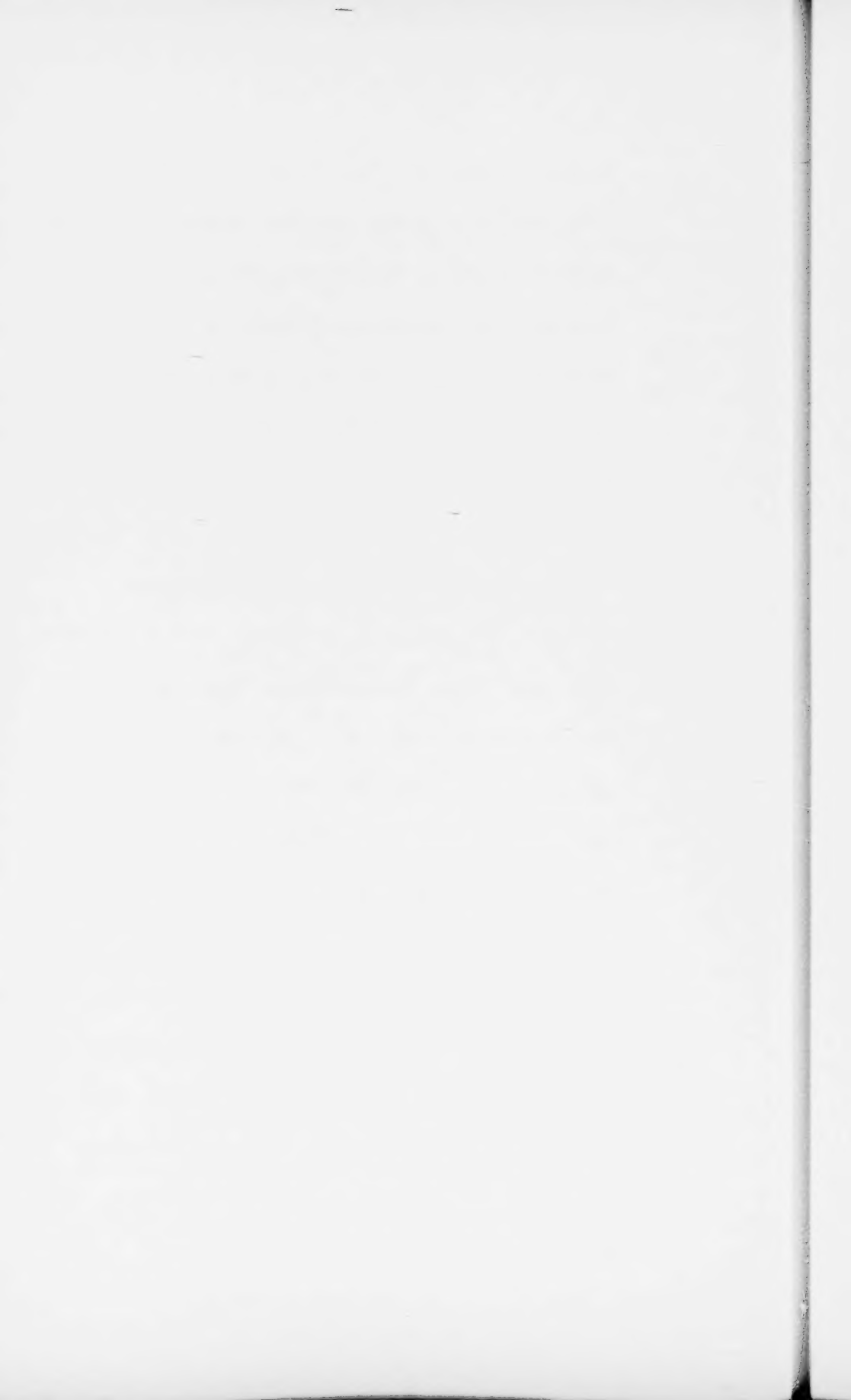
Before NELSON, REINHARDT and WIGGINS, Circuit Judges.

REINHARDT, Circuit Judge:

Thomas Fujikawa, a trustee of several multiemployer trust funds

established by the Pacific Electrical Contractors Association (PECA) and the International Brotherhood of Electrical Workers (IBEW) pursuant to section 302(c) of the Labor Management Relations Act (LMRA), 29 U.S.C.

- §186(c), brought suit against three of his co-trustees, John Gushiken, Rodney Kim, and Nick Teves, for alleged breach of their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. As required by LMRA, there are equal numbers of employer-trustees and union-trustees for the various funds. The defendants, all employer trustees, filed a motion for summary judgment arguing that the district court did not have jurisdiction over the case because Fujikawa, a union trustee, had failed to exhaust internal



administrative remedies as required by the trust agreement and LMRA section 302(c)(5), 29 U.S.C. §186(c)(5). The district judge agreed and granted the motion. Fujikawa appeals; he asks us to reverse the order in favor of the employer trustees and to grant his cross-motion for summary judgment instead.

I. Facts

This dispute arises out of the refusal of employer trustees to authorize the payment of trust fund benefits to workers engaged in an industry-wide strike. Prior to the strike, the practice of the Funds had been to pay benefits by checks: (1) co-signed manually by one Union Trustee and one Employer Trustee for benefits from the supplemental unemployment fund and the training and vacation fund; (2) authorized by



computerized signatures for health and welfare benefits and for relatively insignificant supplemental unemployment benefits (under \$500); and (3) approved by the Trustees and disbursed by the custodian bank directly for annuity and pension benefits.

Shortly after the strike began, Rodney Kim, who is also the Executive Secretary of the multiemployer association (PECA), wrote a letter to the PECA-IBEW Fund Administrative Office stating:

(B)efore any trust fund benefits are paid ... a meeting of the trustees of each fund (will) be held. The purpose of these meetings is to determine what benefits should be paid during the strike. For instance, no benefits for vacation/holiday and supplemental unemployment should be paid from and after September 10, 1984 without prior trustee approval. Therefore, I am returning (the supplemental unemployment benefits) checks



unsigned, pending a meeting of the trustees. Also, do not use any printed signature of PECA trustees for checks, from and after September 10, 1984.

The Administrator of the Funds, Tetsuro Ushijima, replied to Kim stating that he would abide by Kim's instruction. However, Ushijima noted:

As an Employer Trustee of each PECA-IBEW Trust Fund, ... you can appreciate the predicament that the Ad Office is placed in as a result of the labor dispute between PECA and Local Union 1186 IBEW ... (T)he Trustees of each Fund and I as Administrator ... have a primary duty and fiduciary responsibility to continue providing benefits to eligible participants of each Plan in accordance with the Plan rules.

After the strike commenced, two of the employer trustees, Kim and Gushiken refused to sign benefit checks.

Teves, the other employer trustee, informed the Administrative Office that, because of the strike, no loan applications to the Annuity Fund based



on financial hardship would be approved.

After almost four months, the strike was settled and a new collective bargaining agreement was ratified. At that time, the employer trustees resumed signing benefit checks, at least for most of the participants and beneficiaries--those who had purportedly waived the right to sue the trustees for failure to pay benefits during the strike.

While the strike was still in progress, Fujikawa, in his capacity as union trustee, brought suit in federal district court alleging that the employer trustees had breached their fiduciary obligations to the funds and their concomitant duty to act solely in the best interests of the funds' beneficiaries. See 29 U.S.C. §§ 1103(c)(1) & 1104. Fujikawa



contended that the employer trustees refused to sign or approve the checks in order to deny monetary benefits to workers who exercised their right to strike, and that their refusal had the effect of strengthening PECA's bargaining position in its negotiations with the union.

The employer trustees filed a motion for summary judgment arguing that Fujikawa, a union trustee, was required to exhaust internal administrative procedures before filing suit. Fujikawa filed a cross-motion for summary judgment.

The district court granted the employer trustees' motion. The court construed our decisions in Amato v. Bernard, 618 F.2d 559 (9th Cir.1980) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir.1984) as requiring Fujikawa to exhaust internal claims



procedures. The court also interpreted a provision in the trust agreement requiring beneficiaries to exhaust administrative remedies before filing suit as applying to trustees as well.

II. Trustee's Authority to Seek Relief in Federal Court for Violation of Co-Fiduciary's Duty

The employee benefits funds involved in this case are governed by a comprehensive scheme of federal regulation. Two statutes are especially significant: The Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., Section 302(c)(5) of the LMRA authorizes the creation of trust funds to provide benefits to employees. 29 U.S.C. § 186(c)(5). As the Supreme

Court has noted, Congress' primary reason for "cast(ing) employee benefit plans in traditional trust form (in section 302(c)(5) was) precisely because fiduciary standards long established in equity would best protect employee beneficiaries." NLRB v. Amax Coal Co., 453 U.S. 322, 332, 101 S.Ct. 2789, 2795, 69 L.Ed.2d 672 (1981). Trust Funds were to have an equal number of union and employer trustees and were to constitute a neutral entity designed to serve the interests of those beneficiaries exclusively.

In 1974, Congress adopted a detailed code governing the operations of employee trust funds. Pub.L. No. 93-406, 88 Stat. 829 (1974). In addition to instituting requirements for the operation and administration of employee benefit funds, "ERISA



essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." Amax Coal, 453 U.S. at 332, 101 S.Ct. at 2795.

Fujikawa alleges that the employer trustees' failure to sign benefit checks during the strike was motivated by their desire to use their power as trustees as an economic weapon for the employers and had the effect of strengthening the multiemployer association's bargaining position. The denial of benefits--either in cash or in kind--to striking workers certainly weakens the ability of a union and its members to withstand prolonged economic conflict. The change in the practices of the funds ordered by the employer trustees following commencement of the strike raises a substantial question whether their actions were taken in order to



improve PECA's bargaining position.

Cf. Siles v. ILGWU National Retirement Fund, 783 F.2d 923, 929 (9th Cir.1986) ("If the trustees of an employee pension plan adopt a rule that prevents a disproportionate number of employees from receiving benefits, the burden shifts to the trustees to show a reasonable purpose for the exclusion."); 29 U.S.C. §1103(c)(1).

[1] The district court ruled that Fujikawa was required to exhaust administrative remedies before filing suit. The various trust instruments establish internal mechanisms by which the beneficiaries of a plan may challenge certain actions taken by the trustees. Counsel for the employer trustees conceded at oral argument that the provision governing challenges to individual eligibility determinations does not apply to



Fujikawa. However, the employer trustees argue that Fujikawa was required to submit the dispute to an arbitrator or umpire by the "deadlock provision" of the trust agreement and of section 302(c)(5). The statute and the trust agreement provide that where the Trustees deadlock over the administration of the fund, an umpire must resolve the dispute.

Fujikawa contends that the deadlock provision is not applicable and he is entitled to bring this action in federal court without first exhausting any internal administrative procedures because he seeks to enforce specific statutory requirements intended to protect beneficiaries.¹

Amax Coal, 453 U.S. at 332, 101 S.Ct. at 2795; 29 U.S.C. §§1104 & 1109. He points out that because Congress established the minimum standard of



care appropriate for ERISA fiduciaries, and intended their fiduciary duties to be mandatory, the standards of care and loyalty are fixed by law and are not subject to modification. 29 U.S.C. §1110(a).

In Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir.1984), we held that exhaustion of contractual grievance mechanisms was not a prerequisite to the filing of suit to enforce section 510 of ERISA, 29 U.S.C. § 1140.² Because we were "faced solely with an alleged violation of a protection afforded by ERISA," we ruled that exhaustion was not required. Id. at 751. Cf. Gibson v. Local 40, Supercargoes and Checkers of the Int'l Longshoremen's Union, 543 F.2d 1259, 1266 n. 14 (9th Cir.1976) (exhaustion of administrative



procedures established by collective bargaining agreement is not a "precondition" to filing a Title VII action in federal court). The fundamental premise of Amaro is that plaintiffs suing for violation of an ERISA statutory provision, like plaintiffs in Title VII and FLSA actions, have a direct right to sue in federal court, without regard to any contractual agreement to arbitrate the dispute. See, e.g., Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981).

The employer trustees assert that in this case section 302(c),(5) of the LMRA is applicable, and therefore that its requirement of exhaustion controls. Although Amaro did not decide the precise question before us, we believe its principles are



controlling here. Exhaustion of internal dispute procedures is not required where the issue is whether a violation of the terms or provisions of the statute has occurred. The Amaro rule is equally applicable whether the dispute procedure is established by contract or by virtue of the requirements of the LMRA.

Section 302(c)(5) provides that where the employer trustees and union trustees reach a deadlock on "the administration of such fund," the dispute must be submitted to an "umpire" to resolve.³ 29 U.S.C. § 86(c)(5); see also Hawkins v. Bennet, 704 F.2d 1157, 1160 (9th Cir.1983) (defining deadlock). As the Supreme Court has observed, "a trustee deadlock over eligibility matters, like any other deadlock, must be

submitted to the compulsory resolution procedure established by §302(c)(5)."
Amax Coal, 453 U.S. at 338, 101 S.Ct. at 2798.

In general, the phrase the "administration of such fund" refers to the operation of the funds under the trust instrument. Our decision in Amato v. Bernhard, 618 F.2d at 559, involved just such an issue. In that case we required the prior exhaustion of internal procedures in an action for "a declaration of the parties' rights and duties" under the pension plan. Amato, 618 F.2d at 561.

Section 503 of ERISA requires plans to provide for internal proceedings and we noted that the court would be benefited in determining Amato's claim by the "pension plan trustees interpreting their plans." Id. at 568. Other examples of disputes over



the "administration of such fund" come readily to mind. For instance, questions about increasing benefits are ordinarily properly viewed as arising under the trust agreement, and not ERISA. We note that the Second Circuit has held that the "deadlock" language in the statute is applicable with respect to all issues that the trustees have authority to decide by virtue of the terms and provisions of the trust instruments. See Mahoney v. Fisher, 277 F.2d 5 (2d Cir.1960); Barret v. Miller, 276 F.2d 429 (2d Cir.1960). Under this interpretation of section 302(c)(5), it is clear that disputes over statutory duties are not included.

[2] Additionally, even under what we have characterized as the "broad interpretation" of the statutory language, Hawkins, 704 F.2d at 1160,



Fujikawa would not have been required to submit the dispute to an umpire prior to filing his action. We have summarized the broad view as follows: "the only dispute for which an arbitrator could not be appointed is one in which the trustees attempted to exceed their powers under the trust." Id. (citing Barrett v. Miller, 276 F.2d at 429). Even under this standard, it is clear that Fujikawa's action would be proper because he alleges in essence that the employer trustees were serving as representatives of the PECA and their individual businesses. No trustee has the authority to step wholly outside of his fiduciary role and cease acting with undivided loyalty to the plan's beneficiaries. When he does so, he clearly exceeds his powers.

Here, Fujikawa sought immediate relief for the alleged refusal of his co-trustees to perform their fiduciary duties. The requirement of submission to an umpire is not controlling under such circumstances. Fujikawa is authorized by statute to bring the present action; in fact, had he not done so, he might have been deemed to have violated his fiduciary obligations.⁴

Accordingly, the district court erred in ruling that Fujikawa was required to exhaust internal remedies. Its grant of summary judgment in favor of the employer trustees must be reversed.

III. Discretionary Submission of the Dispute by the District Court to an Arbitrator

In Amaro, 724 F.2d 747, we suggested that the district court could stay its proceedings in favor of



arbitration. Nothing in ERISA or section 302(c)(5) precludes the district court from staying its proceedings in this case so that an umpire may consider the dispute first.

[3] In Amaro, we outlined some of the procedural factors to be considered in staying an ERISA action. Although in that case arbitration proceedings had already been instituted; the principles are equally applicable here. We noted:

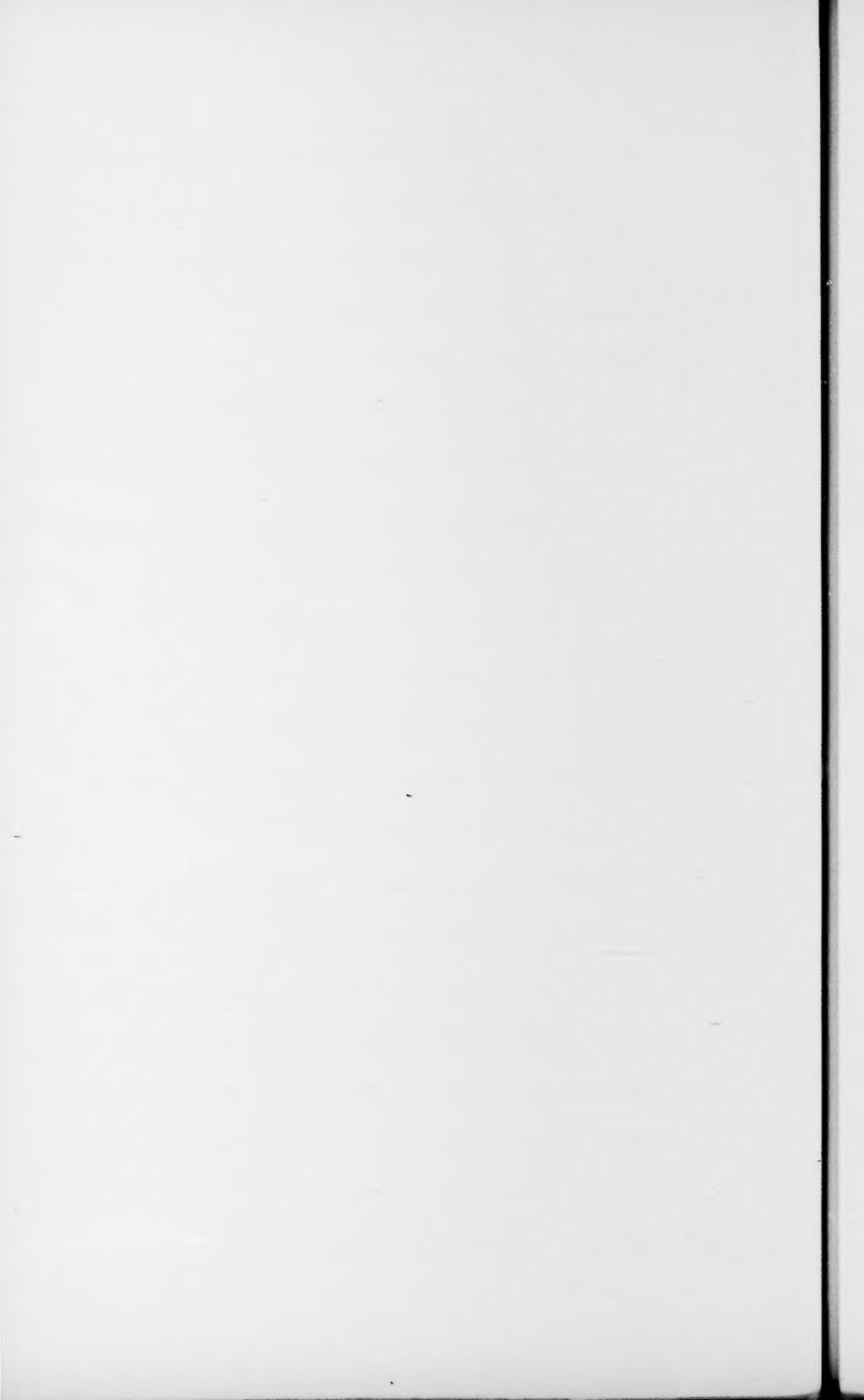
The stay should be premised upon: (1) "receipt of satisfactory assurances that the arbitration is proceeding with diligence and efficiency," ... and (2) a determination that the relief available under (the relevant statutory provision) will not be jeopardized by the stay. In some cases it may be necessary to grant immediately an injunction or other equitable relief, available under (ERISA) to avoid irreparable harm to a party.

724 F.2d at 752 (citation and footnote omitted). Where arbitration has not



been instituted prior to the court's decision, a court may grant a stay only upon receiving satisfactory assurance that the proceedings will be instituted "with reasonable promptness." Railroad Commission of Texas v. Pullman, 312 U.S. 496, 512, 61 S.Ct. 643, 646, 85 L.Ed. 971 (1941); see also Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 30-31, 79 S.Ct. 1070, 1073-74, 3 L.Ed.2d 1058 (1958) (where abstention is ordered, the parties should "cooperate in taking prompt and effective steps to secure (alternative adjudication).... (T)he District Court, of course, reserves power to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt ... determination.").

[4] Where delay would have an adverse impact on the statutory rights sought to be enforced or where strong considerations of public policy militate in favor of speedy judicial resolution, a stay is generally inappropriate. See generally Pike v. Bruce Church, Inc., 397 U.S. 137, 140 n. 3, 90 S.Ct. 844, 846 n. 3, 25 L.Ed.2d 174 (1970); Mengelkoch v. Industrial Welfare Comm'n, 442 F.2d 1119, 1126-27 (9th Cir.1971) (Immediate relief is available where "the federal courts are asked to vindicate a specific Congressional policy ... (and strong policy militates against) leisurely processing of (such) actions."). However, even in such circumstances a stay may be proper if the court simultaneously provides interim relief which adequately protects the



plaintiff's interests. Amaro, 724 F.2d at 752; Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669, 672 (1st Cir.1976) (noting "the propriety of granting preliminary injunctive relief during the period that the district court, retaining jurisdiction, awaits the ... outcome (of the deferred to proceeding). Catrone is an individual litigant whose livelihood is at stake.").

[5, 6] Finally, we note that the court should stay its own proceedings only when doing so would serve some legitimate interest of the parties or the court. Before any such stay is issued, the court should consider whether, under all the facts and circumstances of the case, deferring further judicial action pending the outcome of alternative dispute

resolution proceedings appears to be the most appropriate.

[7] When Fujikawa first filed his complaint in the district court, the employers and the union were embroiled in a lengthy strike. Fujikawa sought immediate relief for the alleged fiduciary breach and argued that delay would result in imminent and serious harm to the funds' striking beneficiaries. It appears that it would have been appropriate for the court to have considered temporary or preliminary injunctive relief, or perhaps a stay and interim relief. Denial of ERISA pension and welfare benefits to eligible workers should be rectified quickly and expeditiously, especially where those workers are not receiving pay due to a strike, a federally protected activity. 29 U.S.C. § 157.



Here, by the time of our remand, almost two years will have passed since Fujikawa filed suit. The strike is long over and, presumably, most if not all benefits have been paid. There is now no immediate crisis, thus, temporary or preliminary relief is not required. Nevertheless, it is important that the parties receive a prompt and definitive resolution of the basic question whether striking workers are entitled to receive benefits under the various trusts involved. Because the parties' current collective bargaining agreement, and undoubtedly succeeding agreements, will from time to time expire and because strikes may from time to time recur, Fujikawa and the beneficiaries whose interests he represents are entitled to a determination whether persons covered



by the trust are entitled to receive benefits during strikes.

On remand, the district court should consider whether its decision-making process would be aided in any way were it to direct that the dispute be submitted to an umpire and, then, receive a copy of his decision. Although we do not decide that question, we note that the employer trustees' only substantive claim appears to be that striking workers are not "employees" and, therefore, are not eligible for benefits. This argument appears at first impression to be frivolous.⁵ Nevertheless it is the district court's role to decide initially how it wishes to proceed with the handling of the litigation, and there may be other factors it will wish to consider as well. There is always the possibility, for example,



that requiring the parties to utilize the umpire-procedure will result in a final resolution of the dispute and obviate the need for further court litigation. There are sometimes other advantages to the parties that result from requiring them to pursue or promote dispute resolution process, including therapeutic ones. See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960) ("The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."). In any event, on remand the district court may, in its discretion, refer the matter to an umpire, to reconsider Fujikawa's motion for summary judgment or



consider such other appropriate motion as the parties may make.

We do not pass on the merits of Fujikawa's countermotion for summary judgment, which he is free to seek reconsideration of in the district court.

IV. Attorneys' Fees

[8] Under 29 U.S.C.

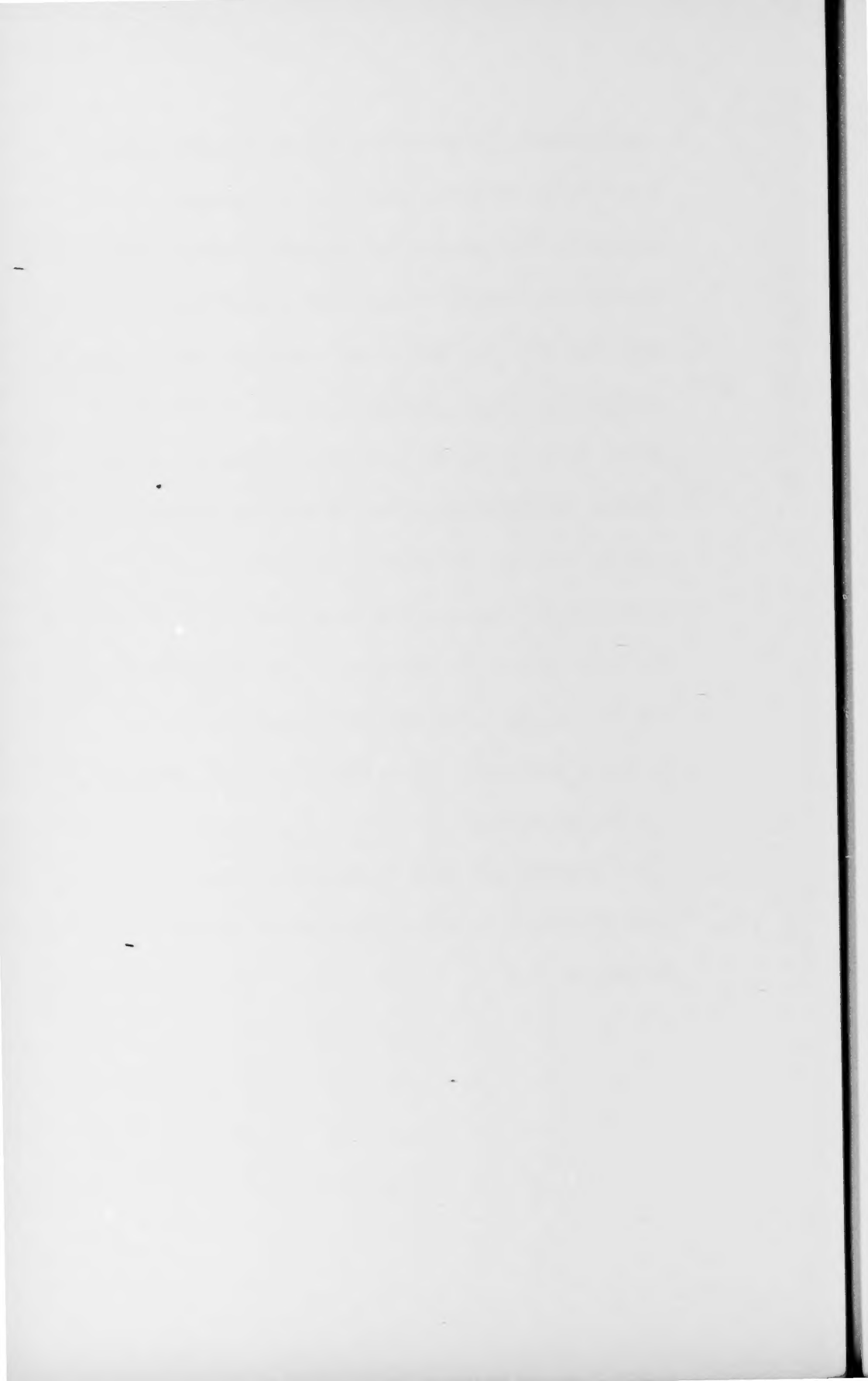
§ 1132(g)(1), we have "discretion (to) allow a reasonable attorney's fees and costs of action to either party."

Unlike most attorney's fees provisions, there is no requirement that a party "prevail" as a prerequisite to obtaining fees. We have previously set forth a number of factors to be considered in making a fee award under the applicable statute: the culpability and good faith of the opposing party; the ability of the party to pay fees; the



increased deterrence that would result from the award; whether a number of beneficiaries would benefit from the award of fees; and the relative merits of the parties' positions. See Hummel v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir.1980). Here, under those standards, Fujikawa is clearly entitled to an award of fees. That his party opponents are his co-trustees is no bar. If Fujikawa perfects his claim for fees in a timely manner, we will fix the amount to be awarded.

REVERSED AND REMANDED FOR
PROCEEDINGS CONSISTENT WITH THIS
OPINION



FOOTNOTES

¹ We note that Fujikawa has "an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries." Amax Coal, 453 U.S. at 333, 101 S.Ct. at 2796; see also 29 U.S.C. § 1105(a).

² Section 510 of ERISA provides:

It shall be unlawful ... to discharge, fine, suspend, expel, discipline, or discriminate against a participant or a beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan].

29 U.S.C. § 1140.

³ The trust instrument contains language parallel to that of the statute.

⁴ Because our authority under ERISA is primarily equitable, we note that, under traditional equity principles, and wholly aside from any statutory source, Fujikawa's suit to enforce fiduciary duties and to request that the court instruct the trustees as to their duties is proper. Where a trustee is under a duty to exercise a power conferred upon him, and fails to do so, "the other trustees are not justified in merely acquiescing in the non-exercise



of the power.... In such a case it is their duty to apply to the court for instructions." Restatement 2d, Trusts, § 184, comment c (1959). Where there are co-trustees, each can maintain a suit to compel another trustee to perform his duties or to enjoin him from committing a breach of trust. Id. at § 200, comment e. Here, Fujikawa was required to bring suit according to his duties as a trustee at equity and under ERISA.

While it has been suggested that "(a)ll beneficiaries should be made parties, unless they are otherwise adequately represented" where a trustee seeks instruction, G. Bogert, The Law of Trusts and Trustees, § 559, at 165-6 (1980), Fujikawa's status as a union trustee suing to enforce the employer trustees' duties satisfies any such requirement. Cf. Lewis v. Benedict Coal Corp., 361 U.S. 549, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960) (not all elements of private law third party beneficiary contract doctrine apply to collective bargaining agreements).

⁵ We note that it is an elementary proposition of labor law that striking workers remain "employees." For example, 29 U.S.C. §152(3) defines "employee" in part as "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." There is no indication in any of the trust instruments that the parties' intended to alter this definition.



Moreover, we do not pass on the question whether the parties could alter the meaning of "employee" so as to exclude workers engaging in federally protected activities.

In addition, we note that the Funds' counsel was asked to prepare an opinion on the question whether the Funds had an obligation to continue paying benefits to striking workers. His conclusion was as follows:

On termination of the Labor Agreement, each Trust continues to operate for the purposes for which each Trust was established for a period of time sufficient to wind up the affairs of each Trust. Accordingly, during the period of time in which each Trust is winding up its affairs, the Trustees must use Trust assets to pay benefits as provided in Article III of each Trust and to pay expenses of administration incident thereto.



APPENDIX B

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF HAWAII

THOMAS FUJIKAWA,)	CIVIL NO.
)	84-1243
Plaintiff,)	
)	ORDER GRANTING
vs.)	MOTION FOR
)	SUMMARY
JOHN GUSHIKEN,)	JUDGMENT
et al.,)	
)	
Defendants.)	
_____)	

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

The Defendants, John
Gushiken, Rodney Kim and Nick Teves,



Jr., have made a Motion for Summary Judgment in their favor dismissing the action because there is no issue as to any material fact that the Plaintiff, Thomas Fujikawa, failed to exhaust the internal claims and appeals procedures applicable to claims for benefits, and that the Defendants are entitled to judgment as a matter of law that the Plaintiff was required to exhaust these procedures before bringing suit. The Plaintiff has made a Countermotion for Partial Summary Judgment for an order in his favor, among other things, compelling the Defendants to make benefit payments.

On considering the memoranda and affidavits filed with the Court, and after hearing counsel for the respective parties, the Court hereby orders that the Defendants' Motion for



Summary Judgment dismissing the action is GRANTED, and, further, orders that the Plaintiff's Motion for Partial Summary Judgment is DENIED.

In support of this Order, the Court notes as follows:

The Declaration of Trust Agreements provide that the internal claims and appeals procedures apply to the claims for benefits in this case. The fact that the Plaintiff is a fiduciary, rather than a participant or beneficiary, does not bar application of the internal claims and appeals procedures to these claims.

The Court's review of the Ninth Circuit Court of Appeals law, particularly the decisions in Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980), and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984),



convinces it that the exhaustion requirement is applicable to this action. Legislative history and policy considerations confirm that it should therefore be dismissed.

DATED: Honolulu, Hawaii,
January 22, 1985.

/s/ Robert P. Aguilar
Judge of the
above-entitled Court

Thomas Fujikawa v. John Gushiken,
et al., Civil No. 84-1243 (Order
Granting Motion for Summary Judgment)



APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS FUJIKAWA,)	No. 85-1694
)	
Plaintiff-Appellant,)	
)	<u>O</u> <u>R</u> <u>D</u> <u>E</u> <u>R</u>
vs.)	
)	
JOHN GUSHIKEN, et al.,)	
)	
Defendants-Appellees.))	
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BEFORE: NELSON, REINHARDT and WIGGINS,
Circuit Judges

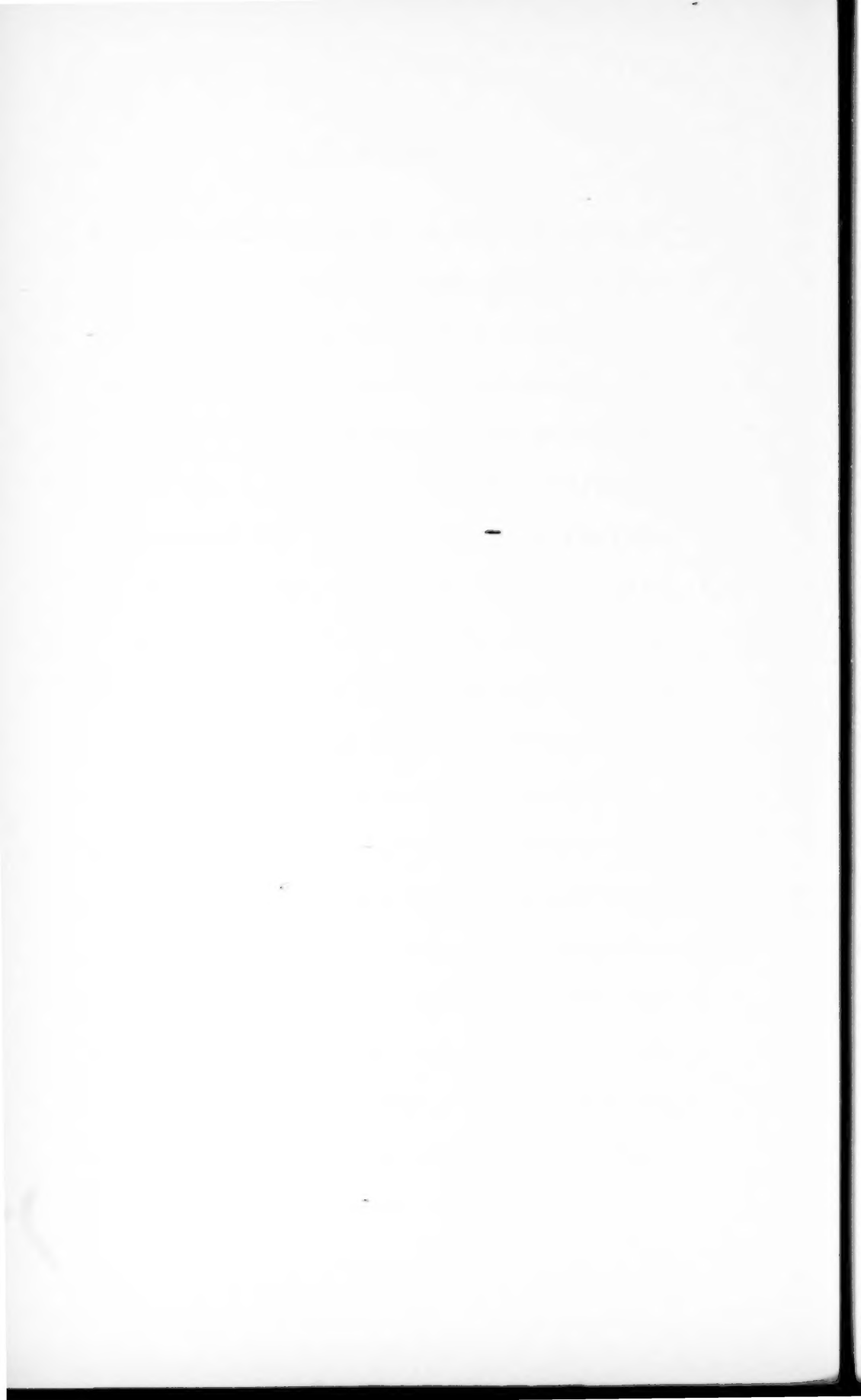
The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.



APPENDIX D

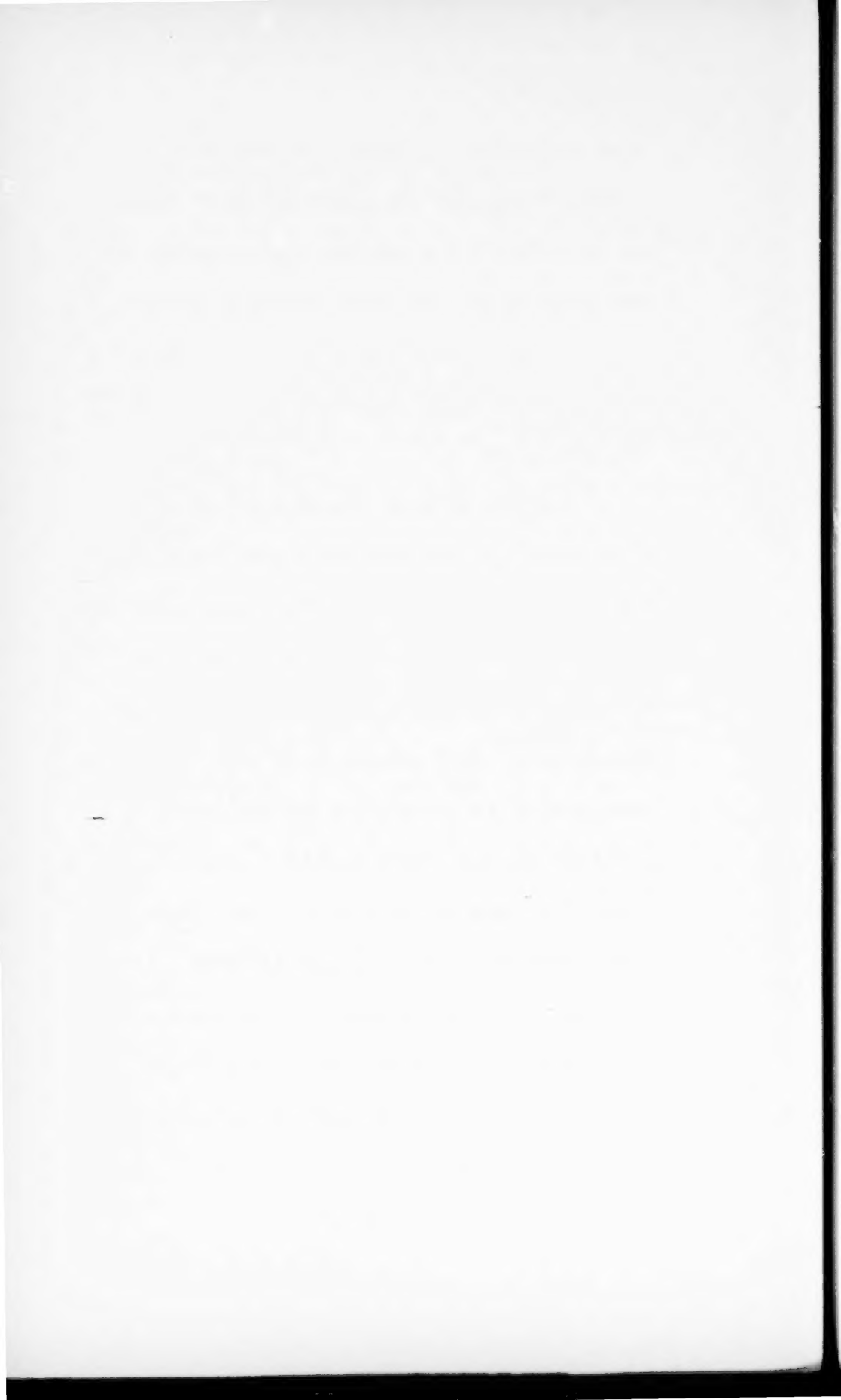
29 USCA § 1022 . Plan description and - summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in



the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(a)(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.



(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification,

ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).



29 U.S.C. § 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(a)(1)(A) for the exclusive purpose of:

(a)(1)(A)(i) providing benefits to participants and their beneficiaries; and

(a)(1)(A)(ii) defraying reasonable expenses of administering the plan;

(a)(1)(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;



(a)(1)(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(a)(1)(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.



29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action a civil action may be brought-

(a)(1) by a participant or beneficiary-

(a)(1)(A) for the relief provided for in subsection (c) of this section, or

(a)(1)(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(a)(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(a)(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which



violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(a)(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(a)(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or



(a)(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

[. . .]

(e) Jurisdiction

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(e)(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district



where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.



29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall-

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C § 1140. Interference with
protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary -for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 et seq.), or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or



is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this Section.



29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date
Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

[. . .]

(c) Definitions

For purposes of this section:

(c)(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of



Columbia shall be treated as a State law rather than a law of the United States.

(c)(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.



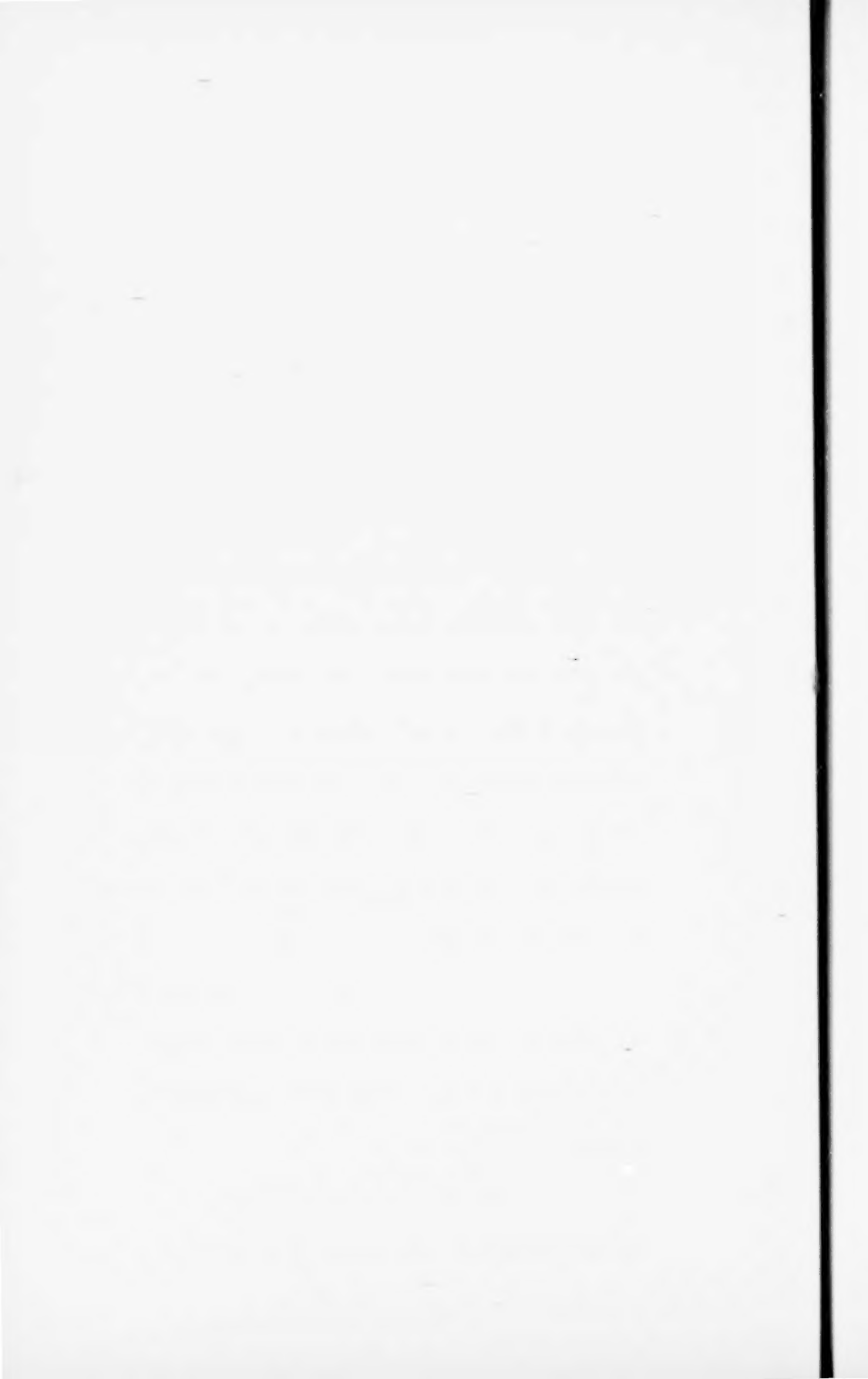
29 U.S.C. § 186. Restrictions on
financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value-

(a)(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

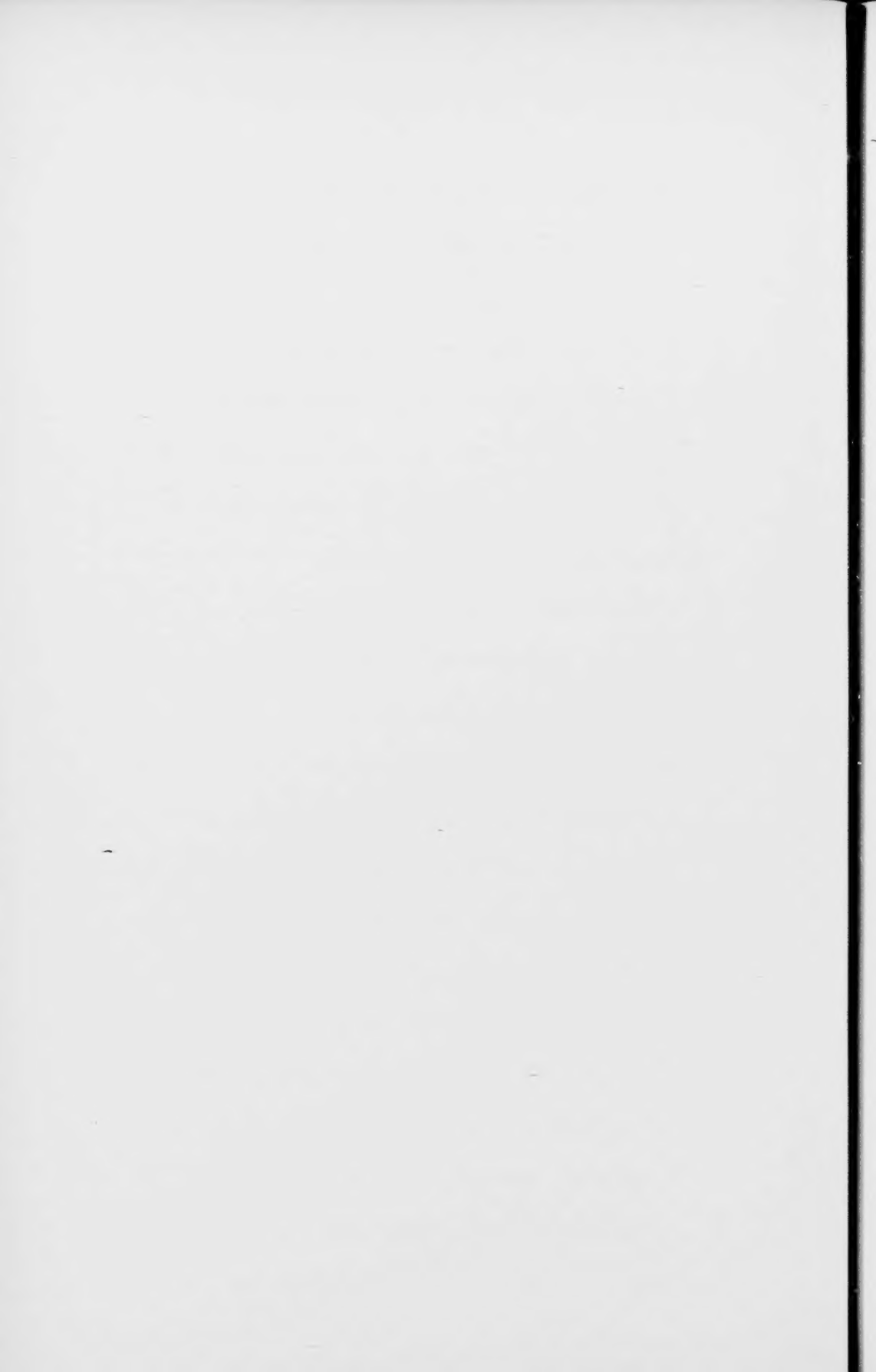
(a)(2) to any labor organization, or any officer or



employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(a)(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(a)(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or

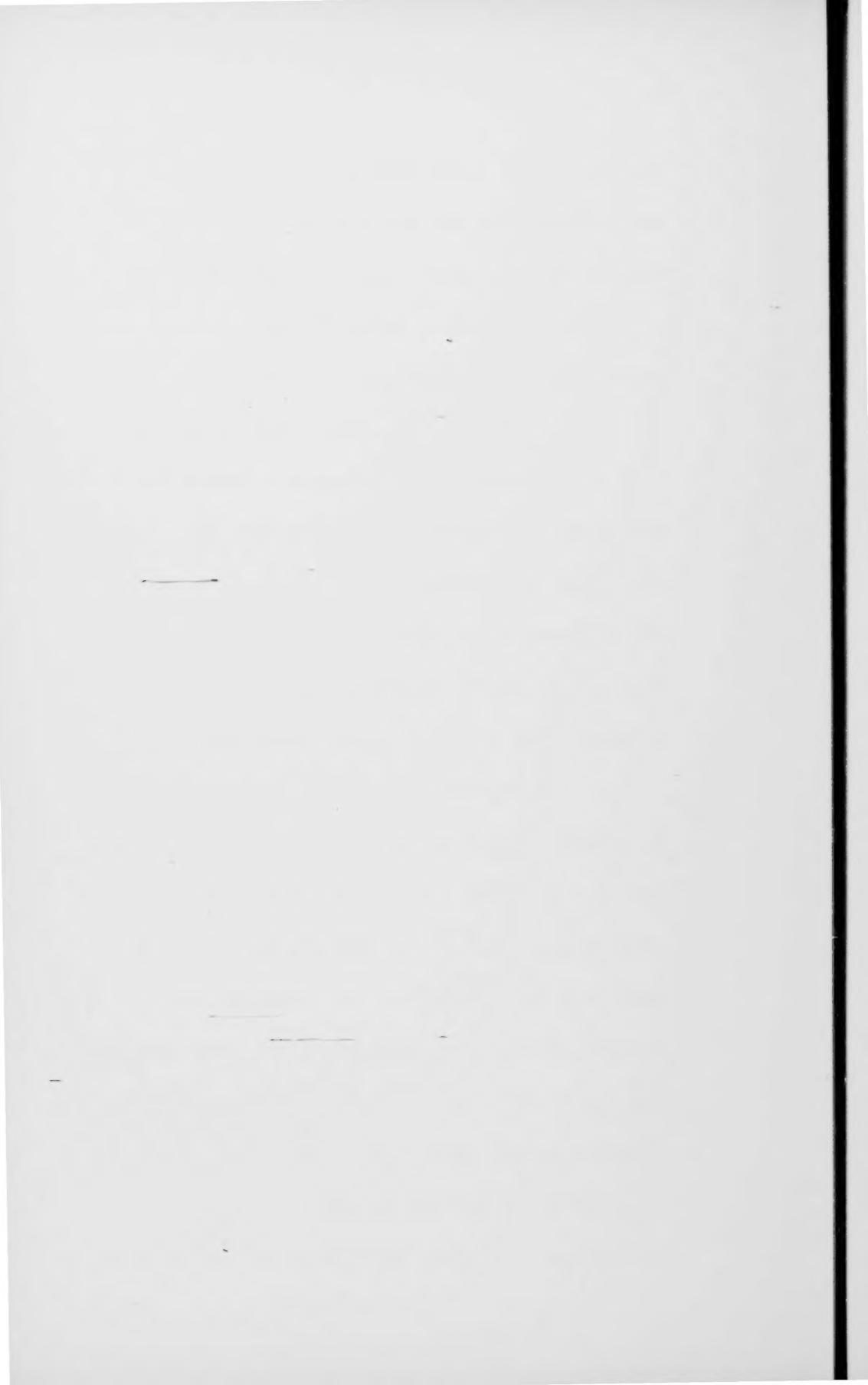


duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(b)(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such



operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

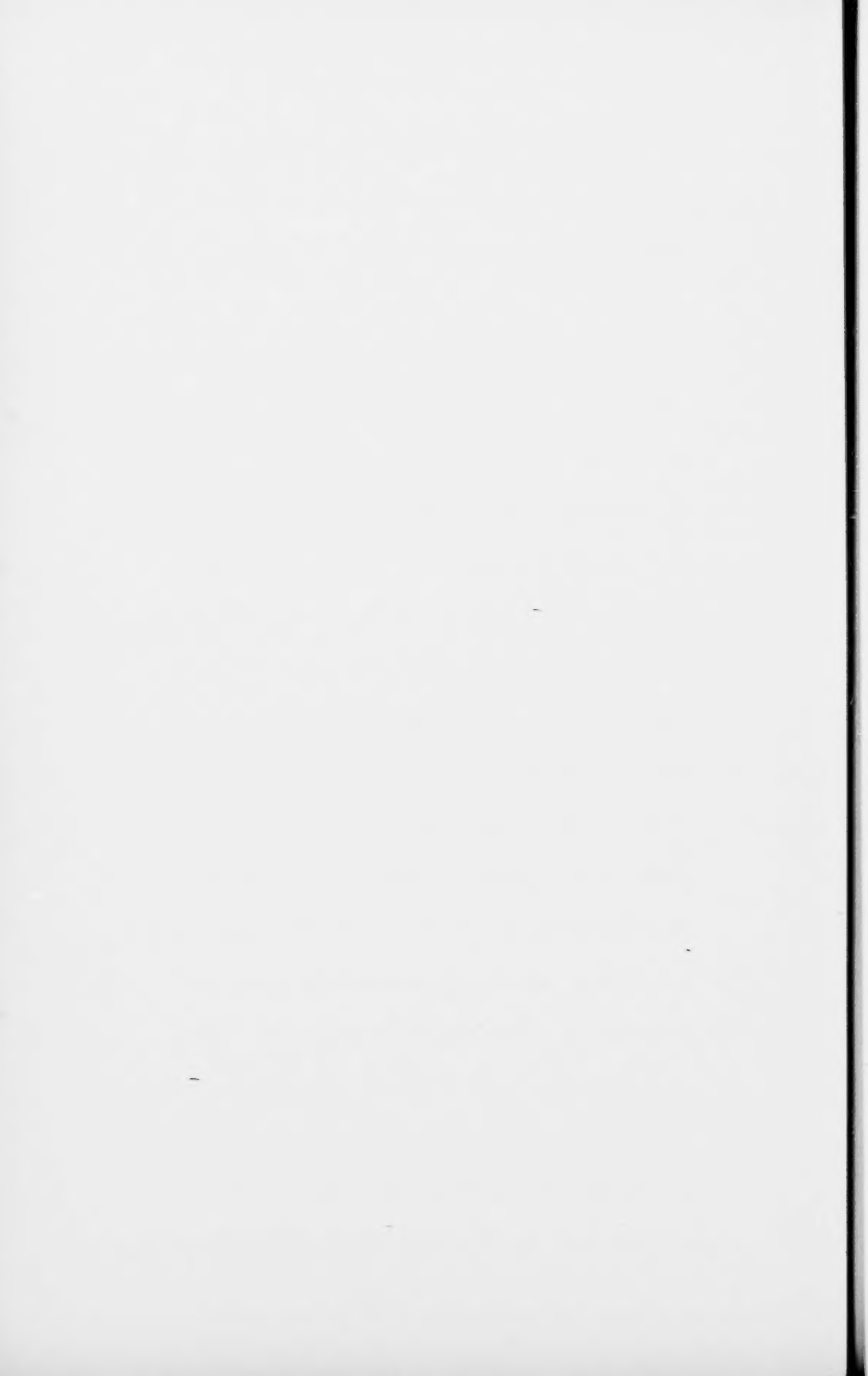
The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to



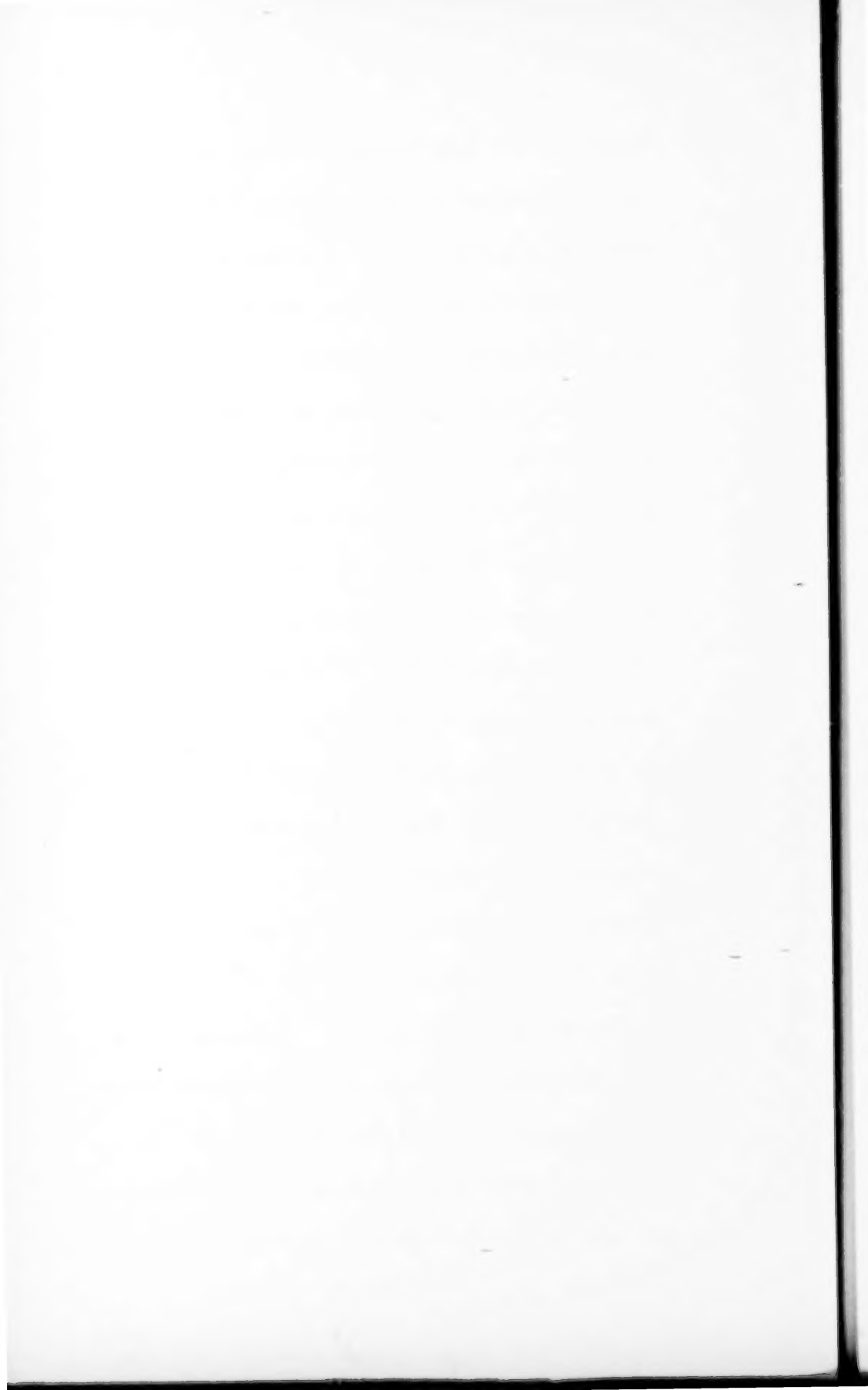
any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the



employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the



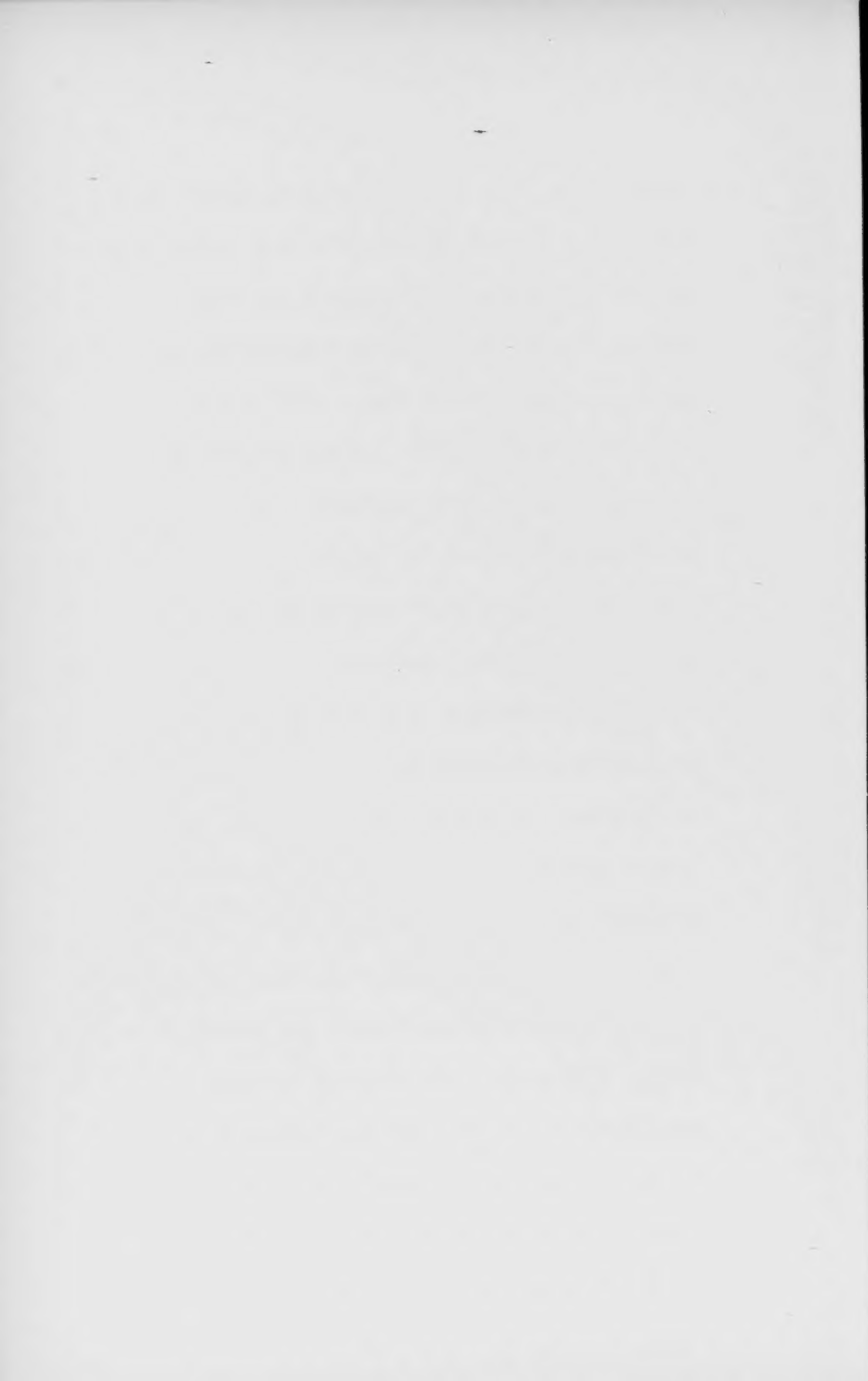
benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and



there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or



annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of



employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided,



That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished:

(A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401

et seq.); or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalty for violations

(d)(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or



committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more



than one year, or both.

(d)(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than \$15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed \$1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than \$10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall



have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions
This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds
Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by



collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.



29 C.F.R. § 2560.503-1. Claims
procedure.

(a) Scope and purpose

(a)(1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

(b) Obligation to establish a reasonable claims procedure

Every employee benefit plan shall



establish and maintain reasonable claims procedures.

(b)(1) A claims procedure will be deemed to be reasonable only if it:

(b)(1)(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

(b)(1)(ii) Is described in the summary plan description, as required by §2520.102-3,

(b)(1)(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

(b)(1)(iv) Provides for informing participants in writing, in

9

a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

(b)(2) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees):

(b)(2)(i) Such plan will be deemed to comply with the provisions of paragraphs (d) through (h) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference.

(b)(2)(i)(A) Provisions concerning the filing of benefit



claims and the initial disposition of benefit claims, and

(b)(2)(i)(B) A grievance and arbitration procedure to which denied claims are subject.

(b)(2)(ii) Such plan will be deemed to comply with the provisions of paragraphs (g) and (h) of this section (but will not be deemed to comply with paragraphs (d) through (f)) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which denied claims are subject (but not provisions concerning the final and initial disposition of benefit claims).

(c) Claims procedure for an insured welfare or pension plan



(c)(1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(c)(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) Filing of a claim for benefits
For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A



claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(d)(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

(d)(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the



joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

(d)(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more States, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

(d)(4) For purposes of paragraphs (d)(1), (2), and (3) of this section, a communication shall be

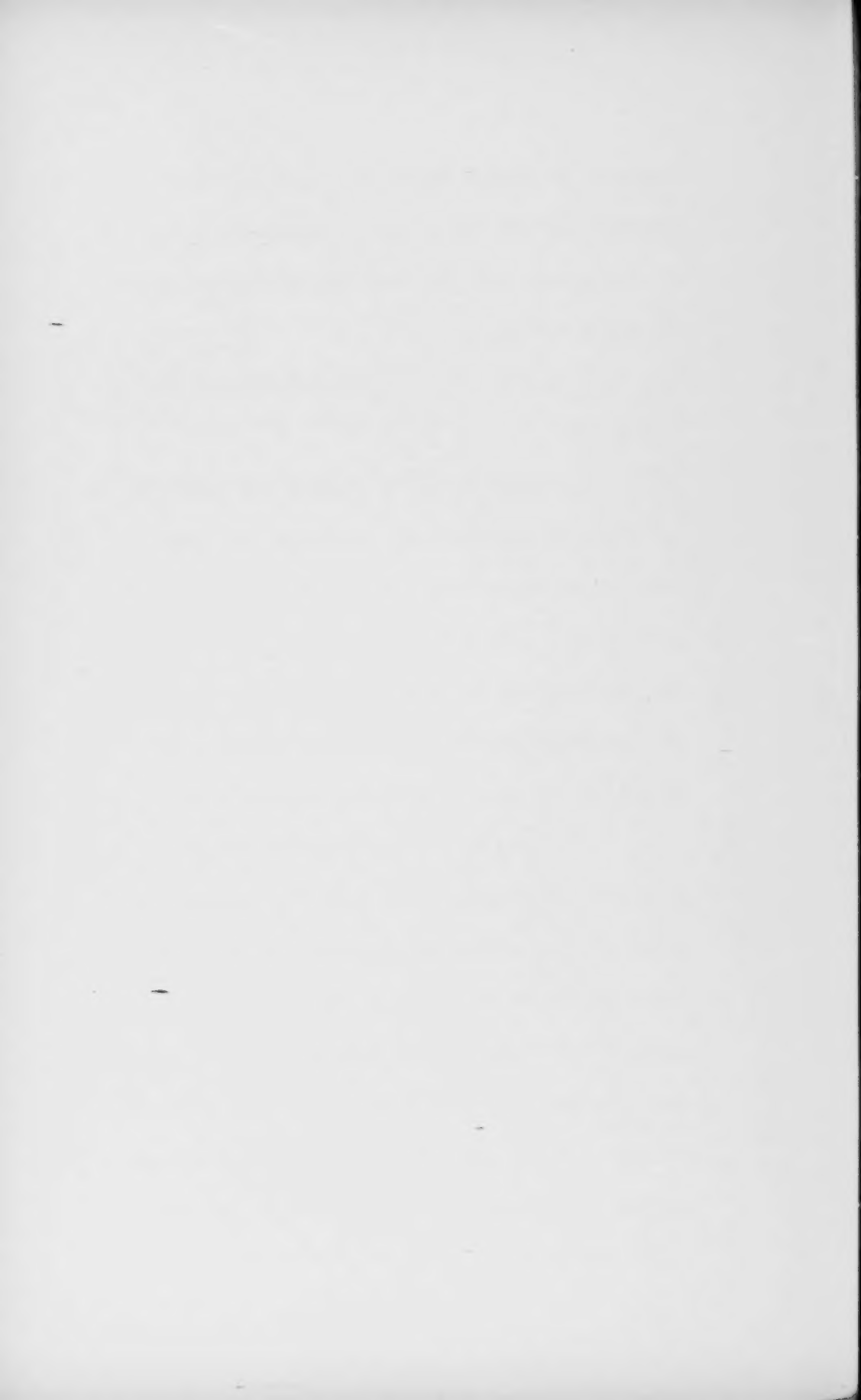


deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(e) Notification to claimant of decision

(e)(1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(e)(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.



(e)(3) For purposes of paragraphs (e)(1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) Content of notice



A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(f)(1) The specific reason or reasons for the denial;

(f)(2) Specific reference to pertinent plan provisions on which the denial is based;

(f)(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(f)(4) Appropriate information as to the steps to be



taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) Review procedure

(g)(1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(g)(1)(i) Request a review upon written application to the plan;

(g)(1)(ii) Review pertinent documents; and



(g)(1)(iii) Submit issues and comments in writing.

(g)(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that



such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

(g)(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) Decision on review

(i)(1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not



ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30



days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(ii)(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(ii)(3) The decision on review shall be in writing and shall



include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(ii)(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(ii)(4)(i) Apprenticeship plans

This section does not apply to employee benefit plans which provide solely apprenticeship training benefits.

(j) Qualified Health Maintenance Organizations



Claims procedures with respect to any benefits provided through membership in a qualified health maintenance organization, as defined in section 1310(d) of the Public Health Service Act, as amended, 42 U.S.C. § 300e-9(d), shall be deemed to satisfy the requirements of this section with respect to the provision of such benefits to persons who are members of such qualified health maintenance organization, provided those procedures meet the requirements of section 1301 of the Public Health Service Act, as amended 42 U.S.C. 300e and the regulations thereunder.



APPENDIX E

Claims Procedure

The Declaration of Trust Agreement for the Supplementary Unemployment Benefit ("SUB") Plan provides in pertinent part:

No employee or beneficiary or person claiming under them may claim benefits except as specified in the plan. Any claim to benefits from the fund under the plan shall be decided by the trustees in accord with the plan. The Trustees shall establish a procedure for the presentation, consideration and determination of any such claim. Such procedure shall comply with ERISA. The Trustees' decision shall be final and binding upon all persons affected by the decision.

No action may be brought to enforce any claim under the plan or against the fund until after the claim for benefits has been submitted to and decided by the trustees in accordance with the procedure. Thereafter, the only action which may be brought is to enforce the decision of the Board or to clarify the rights of the claimant under such decision.



(Article II, Section 4)

The Plan for the SUB Plan
provides in pertinent part:

Section 1. Application
for Benefits; Initial Date.
Application for all benefits
must be made in writing in a
form and manner prescribed by
the Trustees. No benefits
shall be paid prior to the
establishment and crediting
of Individual Accounts for
contributions and the
investment earnings,
October 1, 1976, or prior to
the receipt of written
confirmation from the
Internal Revenue Service of
the United States that the
Trust is an exempt trust
under the provisions of the
Internal Revenue Code,
whichever is later.

Section 2.
Determination of Disputes.
Notice of Denial of Claim for
Benefits. If a claim is
wholly or partially denied,
claimant shall be given
notice of such denial within
a reasonable period after the
claim is received. The
notice shall give (a) the
specific reasons for the
denial, (b) a specific
reference to the plan
provision on which denial is
based, (c) a description of



any additional material or information which the claimant may need to protect the claim, together with an explanation of why the material or information is necessary, and (d) an explanation of the Plan's claims review procedure.

APPEALS PROCEDURE

If a claimant wishes to appeal the denial of a claim wholly or partially, the claimant shall follow the following procedure:

- (a) Step 1. Request for Review. The claimant shall make a written request for review to the Trustees within 120 days from the date the claimant received notice of denial. The request must describe claimant's version of the facts and reasons why the denial was not proper.
- (b) Step 2. Decision. If no hearing is held by the Trustees on claimant's request for review, the Trustee shall render a decision within 60 days after the Trustees receive claimant's request for review.



If a hearing is held by the Trustees on claimant's request for review, the Trustees shall render a decision within 120 days after the Trustees receive claimant's request for review.

A decision on review must be in writing and must include specific reasons for the decision. A decision shall be written so that the claimant can understand it and shall contain specific references to the Plan provisions on which the decision is based.

HEARING; FINAL AND BINDING
DECISION; COURT ACTION

- (a) Before Whom. All hearings shall be heard either before the Board of Trustees or a designated portion of the Board of Trustees.
- (b) Rules. The Trustees may prescribe reasonable rules for the orderly conduct of the hearing to permit a full and fair review of all issues raised for review. The claimant and Trustees may review

pertinent documents, may have legal counsel present at such hearing and may make arguments.

- (c) Time and Place. The time and place for the hearing shall be determined by the Trustees.
- (d) Final Decision. The decision of the Trustees or a designated portion of the Board of Trustees shall be final and binding on claimant and all persons claiming under claimant.
- (e) Court Action Restricted. No claimant may start any court action, suit or proceeding unless the claimant has exhausted all steps required of him under the foregoing appeals procedure.

Section 3. Proof to be Furnished; Penalties for Fraud. Every Employee or beneficiary shall furnish, at the request of the Trustees, any information or proof reasonably required for the administration of the Plan or for the determination of any matter that that Trustees may legitimately have before them. Failure to furnish



such information or proof promptly and in good faith shall be sufficient reason for the denial of benefits to such Employee or beneficiary or the suspension or discontinuance of benefits. The falsity of any statement material to an application or the furnishing of fraudulent information or proof shall be sufficient reason for the denial, suspension or discontinuance of benefits under this Plan and in any such case, the Trustees shall have the right to recover any benefit payments made in reliance thereon.

Section 4. Powers of Trustees. The Trustees shall be the sole judges of the standard of proof required in any case. In the application and interpretation of any of the provisions of this Plan, the decisions of the Trustees shall be final and binding on all parties including Employees, Employers, the Union and the beneficiaries.

(Article IV, Sections 1-4)

Deadlock Procedure

The Declaration of Trust Agreement for the SUB Plan provides in pertinent part:



Section 5. Voting Deadlocked. If the number of votes on any matter is deadlocked, the matter shall be submitted to an impartial umpire mutually agreed upon by the employer trustees and Union trustees. If the employer trustees and Union Trustees cannot agree upon the selection of a person as an impartial umpire, then the impartial umpire shall be selected by the First Judge of the United States District Court of Hawaii. In his absence, the Second Judge or any other judge assigned to the court shall make the selection. The decision of the impartial umpire shall be final and binding upon the trustees and beneficiaries of the trustee. All costs and expenses of the proceedings reasonably made in behalf of the trust, or incurred by the trustees, shall be borne by the trust. The employer trustees may select one attorney in the presentation of their case, and the Union trustees may select one attorney in the presentation of their case, and the costs of such attorneys shall be borne by the trust.



APPENDIX F

Provisions In Dispute

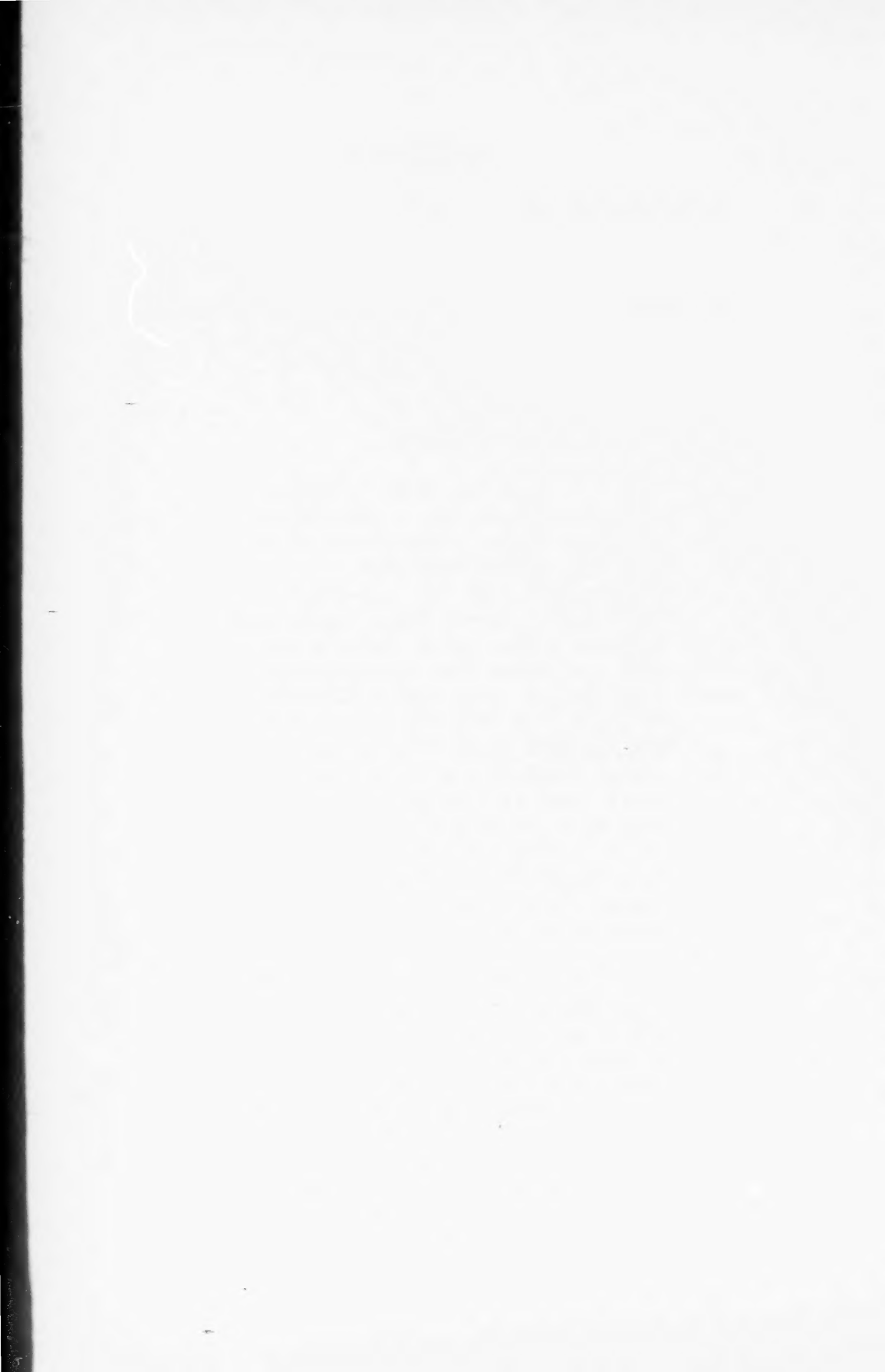
The Declaration of Trust

Agreement for the SUB Plan provides in pertinent part:

ARTICLE I Definitions

3. "Employer" means any association, individual, partnership, corporation or entity which employs employees and is a party to the labor agreement with the Union. The term "employer" may include the Association, the Union, the PECA-IBEW Ad Office (Ad Office), or the PECA-IBEW Training Trust (Training Trust), provided that the inclusion of the respective Association, the Union, the Ad Office or the Training Trust does not jeopardize the tax-exempt status of the trust.

4. "Employee" includes any person employed by an employer under a labor agreement with the Union. The term "employee" may include the employees of the Association, the Union, the Ad Office or the Training Trust, provided that the inclusion of such employees



does not jeopardize the
tax-exempt status of the
trust.

[. . .]

(Article I, Sections 3 and 4, Article
III)

ARTICLE III Purpose of the Trust

The trust shall be used
solely for the purpose of
providing supplementary
unemployment benefits as
determined by the trustees to
the following persons
satisfying eligibility
requirements as determined by
the trustees, provided that
the inclusion of any of the
following persons does not
jeopardize the tax-exempt
status of the trust:

a. All employees of
Employers covered by a labor
agreement with the Union;

The Plan for the SUB
Plan provides in pertinent part: -

ARTICLE I. DEFINITIONS

As used herein:

Section 6. "Employer"
means any association,
individual, partnership,



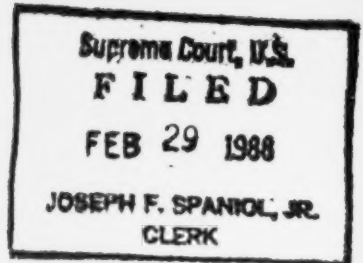
corporation or entity which employs employees and is a party to the labor agreement with the Union. The term "Employer" may include the Pacific Electrical Contractors Association (Association), the Union, the PECA-IBEW Ad Office (Ad Office), or the PECA-IBEW Training Fund (Training Fund), if contributions are made to the Fund pursuant to regulations adopted by the Trustees.

Section 8. "Employee" means any person employed by an Employer under a Labor Agreement with the Union. The term "Employee" may include the employees of the Association, the Union, the Ad Office, or the Training Fund, who are included in the Plan pursuant to regulations adopted by the Trustees.

[. . .]

ARTICLE III. BENEFITS AND ELIGIBILITY

Section 1. Eligibility for Supplementary Unemployment Benefit. An Employee shall be eligible for a Supplementary Unemployment Benefit when he has met all of the following requirements:



No. 87-1302

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN GUSHIKEN, RODNEY KIM AND
NICK TEVES, JR., IN THEIR
RESPECTIVE CAPACITIES AS EMPLOYER
TRUSTEES OF THE PECA-IBEW VACATION
& HOLIDAY SUPPLEMENTARY UNEMPLOYMENT
BENEFIT, AND ANNUITY FUNDS,

Petitioners,

v.

THOMAS FUJIKAWA, IN HIS CAPACITY AS
UNION TRUSTEE OF THE PECA-IBEW
VACATION & HOLIDAY, SUPPLEMENTARY
UNEMPLOYMENT BENEFIT,
AND ANNUITY FUNDS,

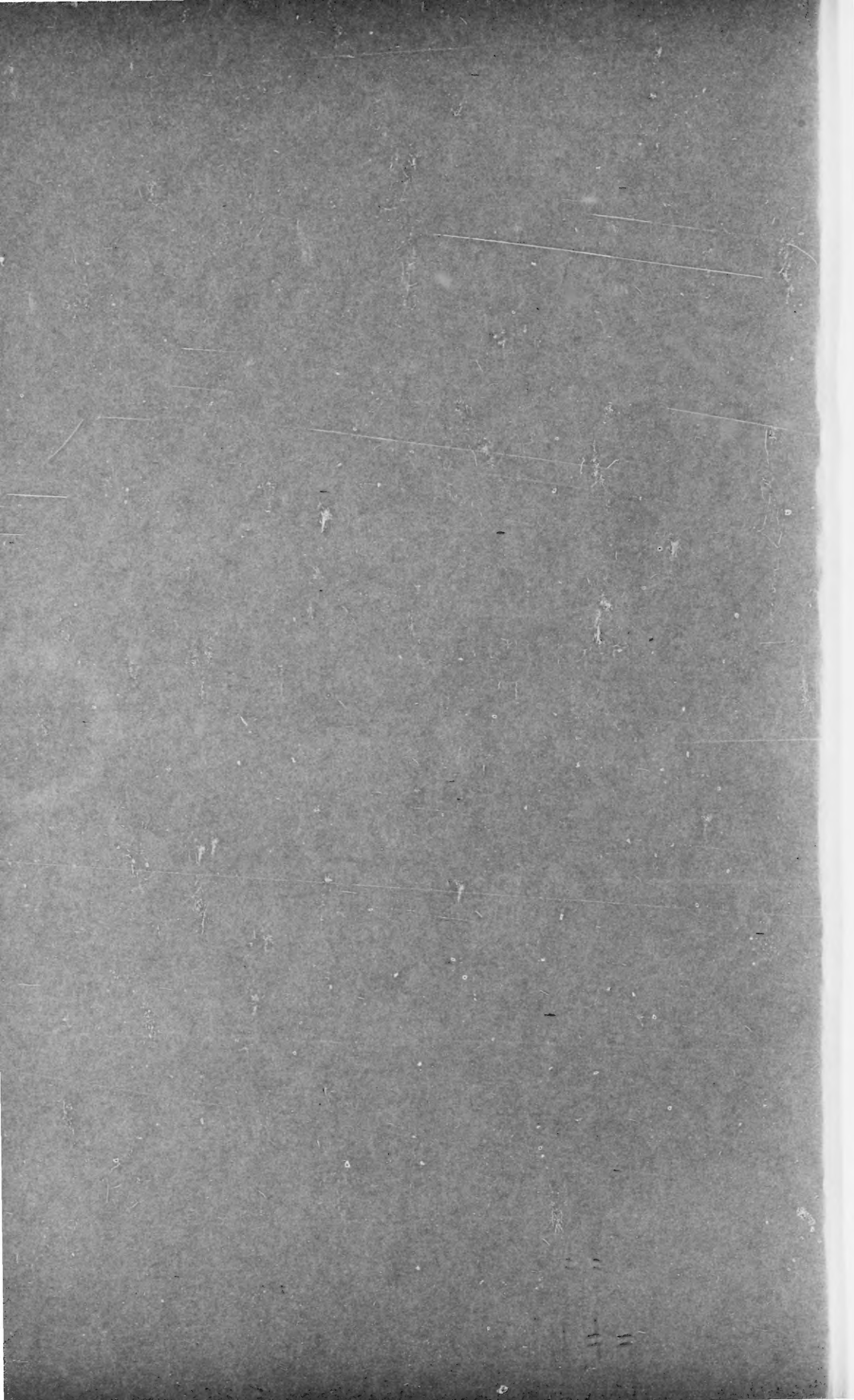
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a fiduciary, who is a union trustee of various trusts established under the Employee Retirement Income Security Act of 1974 (ERISA), may file a civil action requesting declaratory and injunctive relief under Section 502 of the Act, 29 U.S.C. § 1132, against employer trustees who were alleged to be violating their fiduciary duties by refusing to sign benefit checks for striking employee/beneficiaries, without first exhausting an arbitration procedure set forth in the trust documents.

2. Whether the Circuit Court of Appeals for the Ninth Circuit was correct in finding that exhaustion of internal dispute procedures is not required where the basic issue was whether a violation of the terms or provisions of ERISA had occurred.

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No. 87-1302

IN THE
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JOHN GUSHIKEN, RODNEY KIM AND
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THOMAS FUJIKAWA, IN HIS CAPACITY AS
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VACATION & HOLIDAY, SUPPLEMENTARY
UNEMPLOYMENT BENEFIT,
AND ANNUITY FUNDS,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

Respondent requests that no writ of certiorari issue in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 823 F.2d 1341. The opinion of the District Court is unreported. Both opinions are included as Appendix A and B of the petition.

JURISDICTION

Petitioners invoke jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), and, presumably, in accord with Rule 17 of the Supreme Court Rules.

STATUTES INVOLVED

The statutes involved in this case include: 29 U.S.C. § 186; 29 U.S.C.



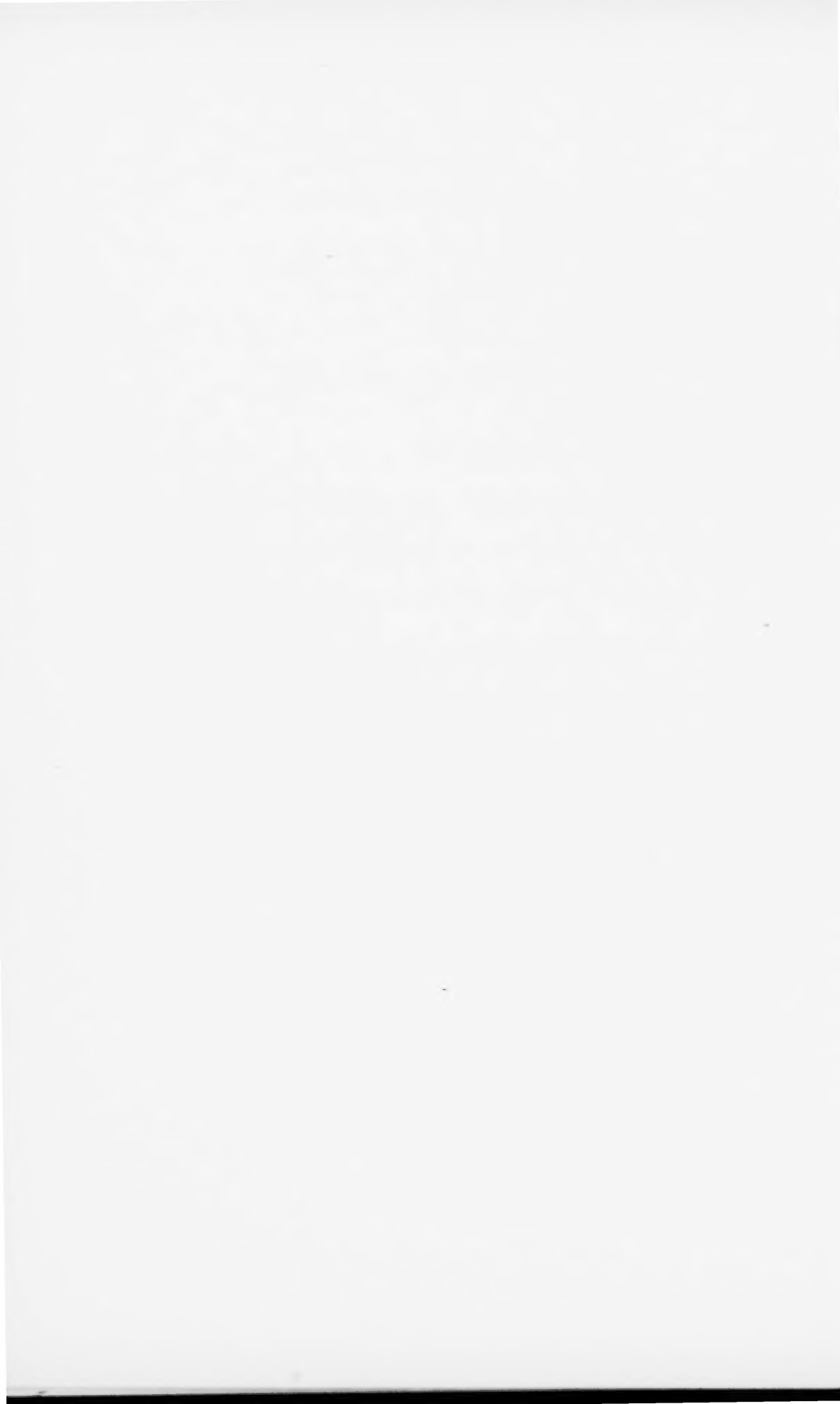
§ 1001 et seq., (ERISA) and in particular, 29 U.S.C. §§ 1104, 1105, 1109 and 1132.

STATEMENT OF THE CASE

A. Factual Background

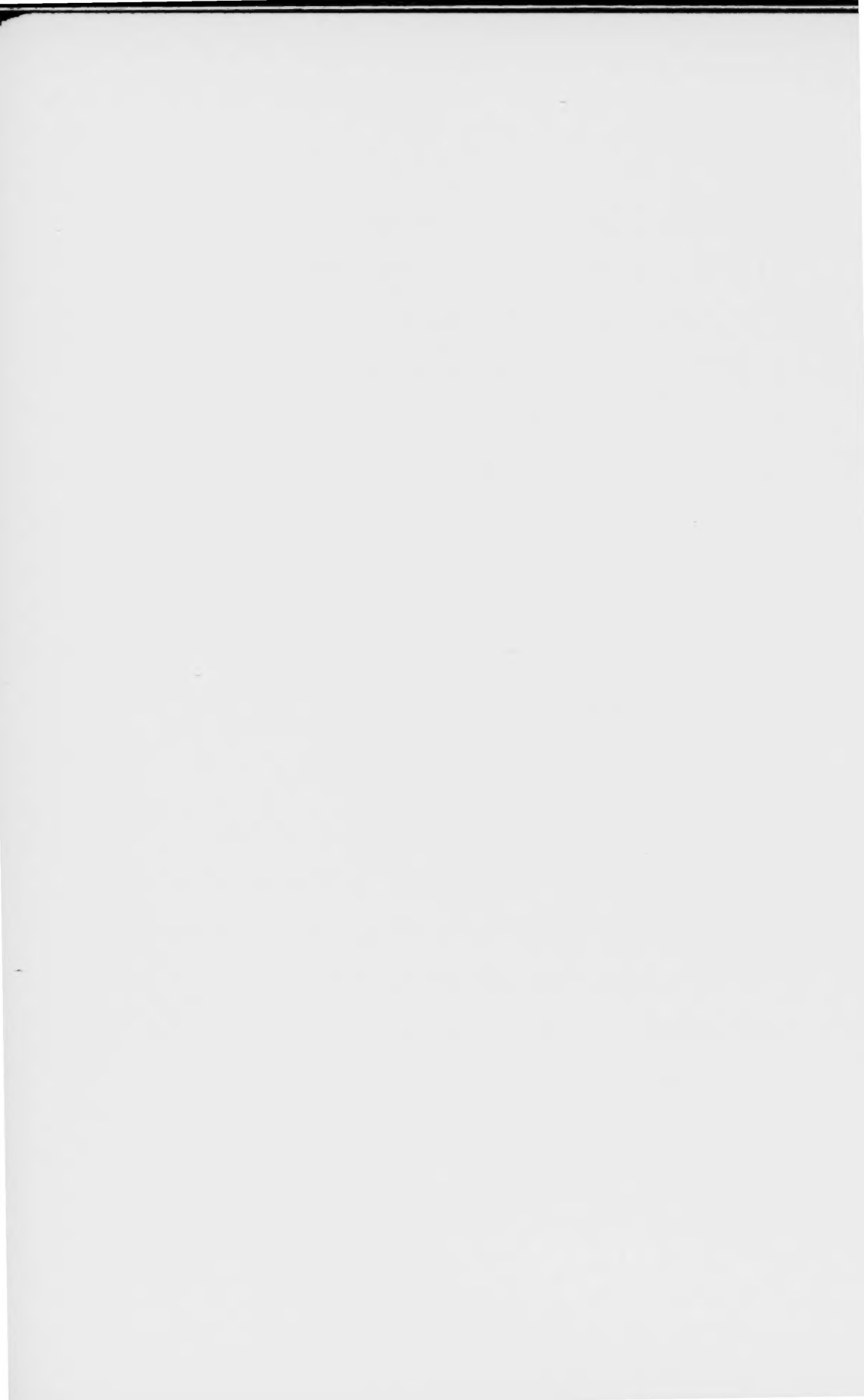
This case arose out of a dispute between the union and employer trustees of several trust funds established by a multi-employer association, Pacific Electrical Contractors Association (PECA), and the union, International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (IBEW). The funds directly involved in the motions filed in the litigation below were the Supplementary Unemployment Benefit Fund (SUB); and the Vacation and Holiday Fund.

The basic cause of the dispute was an electrical workers' strike during the



last third of 1984. The collective bargaining agreement between the IBEW and PECA had expired on August 14, 1984, and a strike was called on September 10, 1984, against some of the employers who were members of PECA.

Starting in September 1984, after commencement of the strike, two of the employer trustees, Rodney Kim and John Gushiken, who had been previously authorized to sign benefit checks for the SUB and Vacation and Holiday Funds respectively, refused to sign a large number of benefit checks prepared by the Funds' Administrative Office. The checks had been prepared according to the Administrative Office's normal procedures. In so doing, the employer trustees prevented earned and funded



benefits, Appendix at A-5 - A-8, from being paid to the beneficiaries claiming them.

The present action was filed by Fujikawa, a union trustee of both funds, in his capacity as a fiduciary. Employer trustees Kim and Gushiken, Defendants and Petitioners herein, were also fiduciaries of their respective funds. There were no claimants or beneficiaries directly involved as parties. The action requested declaratory and injunctive relief and punitive damages. The strike ended with a new contract being signed in early January, 1985, which contract has subsequently expired on August 14, 1987, and the parties are currently in negotiations.

Respondent Fujikawa, a union trustee, is and was the business manager/financial



secretary of the IBEW. Employer trustee Kim is and was executive director of PECA and Gushiken is the owner of one of the electrical contracting companies represented by PECA which was being struck by the IBEW in 1984 at the time of his refusal to sign.

The Respondent's position is that the employer trustees refused to sign benefit checks in order to deny monetary benefits to striking employees, and thus improve PECA's bargaining position. Respondent alleges that this refusal to sign was a violation of ERISA because the employer trustees were violating their fiduciary duty by acting in the interest of the employers in a labor dispute, rather than solely in the interest of participants and beneficiaries of the funds as



required by 29 U.S.C. §§ 1103(c)(1) and 1104(a)(1)(A) and (B).

The employer trustees offered several reasons for their action, which reasons varied over time. First, the employer trustees claimed that there had to be a meeting of the fund trustees to decide whether the claimed benefits should be paid during the strike. At the meetings, the employer trustees then claimed that benefits could not be paid in the absence of a collective bargaining agreement. After fund counsel issued an opinion which contradicted the employer trustees' position, they then claimed that they needed to examine the documentation in regard to the various claims.

The employer trustees' Motion for Summary Judgment asked the District Court to dismiss the lawsuit and require that



the matter be submitted to internal procedures.

The union trustee's Countermotion for Partial Summary Judgment requested denial of the employer trustees' Motion and an Partial Summary Judgment in the union trustee's favor.

After the strike ended on or about January 3, 1985, and a new collective bargaining agreement was ratified, the employer trustees signed the contested benefit checks for most of the beneficiaries who had waived their personal rights to sue those trustees.

B. Legal Questions Involved

Respondent Fujikawa, plaintiff in the District Court action, did not sue as a claimant, but rather as a trustee and fiduciary. He asked for equitable

injunctive and declaratory relief and for punitive damages under 29 U.S.C.

§ 1132(a)(2) and (a)(3)(A) and (B).

Petitioners, Defendants below, have attempted to justify their refusal as trustees to co-sign benefit checks on the ground that the contract had expired and therefore the beneficiaries were no longer "employees" under the trust agreements, and were not entitled to benefits, even though such benefits had been funded and were available for payment. Petitioners then claimed that this dispute was "deadlocked" and therefore had to be arbitrated. Petitioners' ultimate defense then became that the arbitration procedures had to be exhausted before suit could be brought.

The District Court bought
Petitioners' argument. The Ninth Circuit

did not, remarking that the Petitioners' apparent claim that striking workers were not "employees" ". . . appears at first impression to be frivolous." Fujikawa v. Gushiken, et al., 823 F.2d 1341, 1348 (9th Cir. 1987). See, Pet. Appendix at A-33.

The initial legal issue is whether this case involves a breach of fiduciary duties which is a violation of ERISA and thus a matter for the Court to decide, or whether it is merely a disputed claim for benefits which should first be arbitrated.

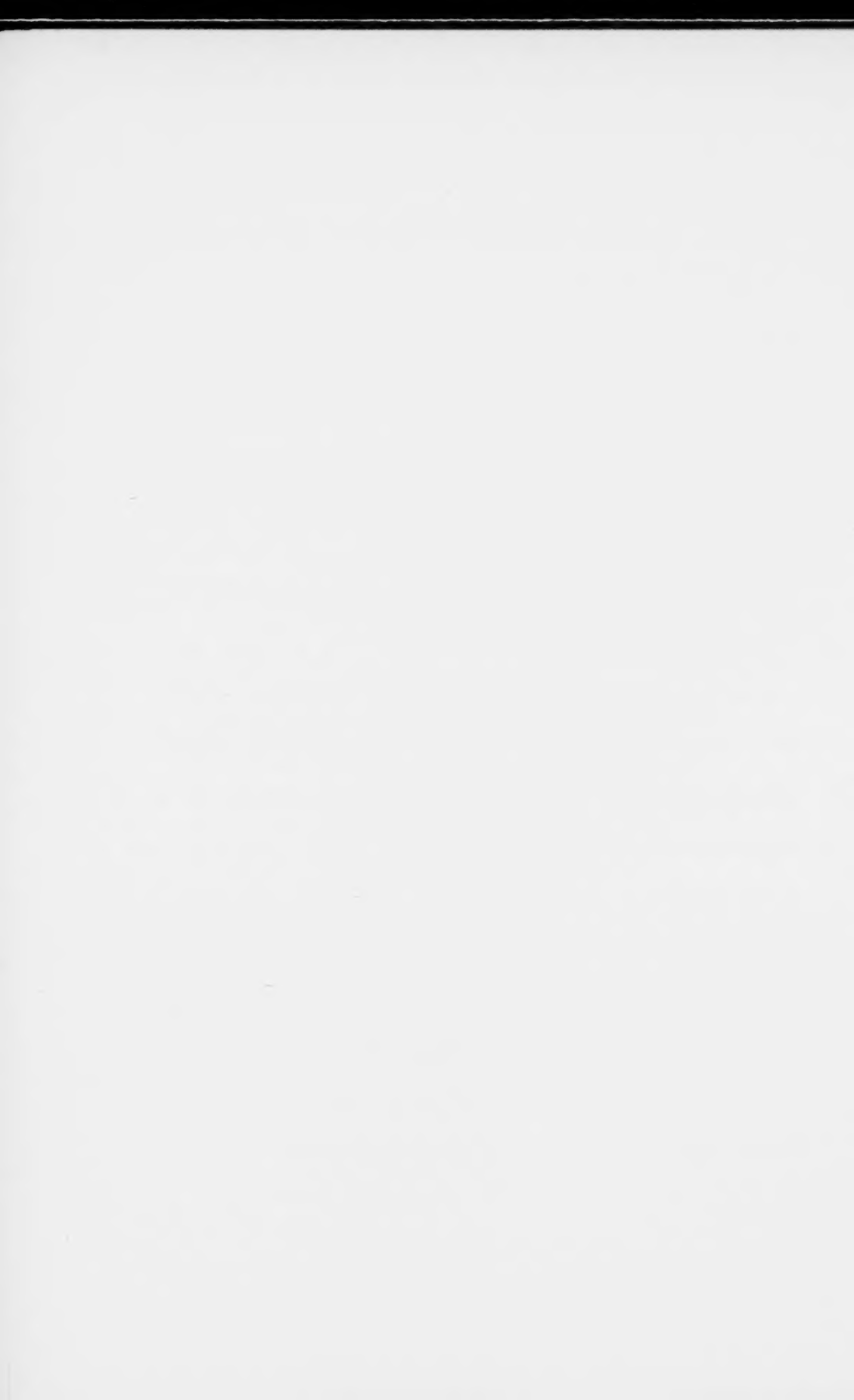
We note, in passing, that Petitioners continually refer to this matter as a "claim" which "ultimately relied on interpretation and application of the Plan documents." This phrase, or a



variant of it, is repeated some eighteen times in the course of the petition. If mere repetition adds substance, then certainly Petitioners are presenting a very weighty case.

SUMMARY OF ARGUMENT

Respondent submits that this is not a proper case for the granting of a writ of certiorari in that the Ninth Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Sup. Ct. R. 17.1(a). Petitioners' attempt to cloud the issue by phrasing it as though it were merely a disputed claim by a beneficiary does not alter the Ninth Circuit's holding. The employer trustees mixed their fiduciary and employer hats



and used the ERISA trusts as a strike weapon. Petitioners have not cited any other circuit decision involving similar facts and circumstances which reached a different result.

Respondent further argues that the Ninth Circuit's decision is in accord with this Court's decisions which distinguish the enforcement of statutory rights from those cases where it is appropriate to defer to arbitration.

ARGUMENT

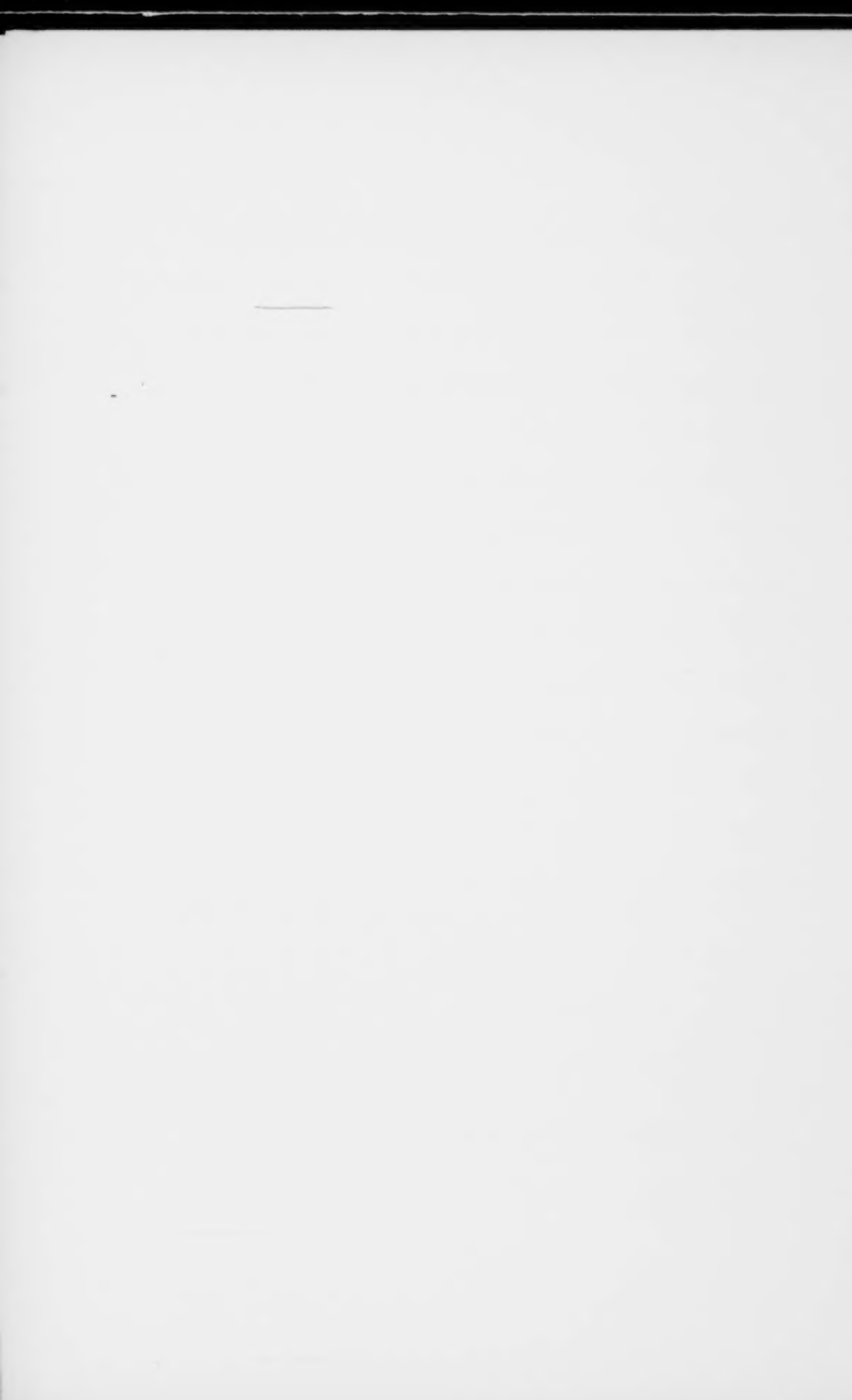
- A. This is an action to interpret and enforce statutory rights under ERISA.

Section 404 of ERISA, 29 U.S.C.

§ 1104, provides in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with



respect to a plan solely in the interest of the participants and beneficiaries and-

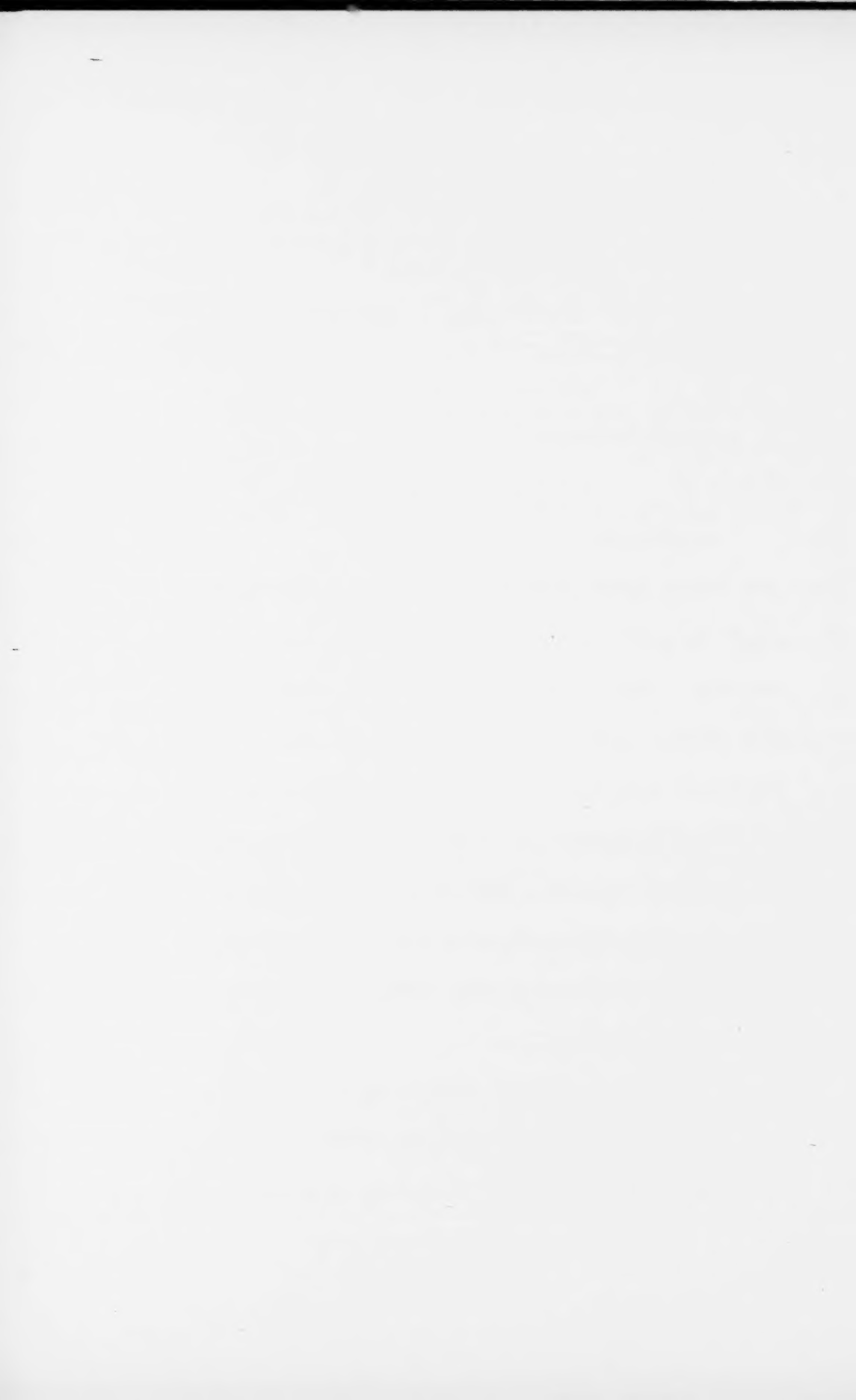
(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) Defraying reasonable expenses of administering the plan;

When Petitioner Gushiken refused to sign holiday checks which were accrued, funded, and payable under the terms of the plan, see Appendix at A-6, merely because the beneficiaries were on strike, and where Gushiken was an employer who was being struck, there is at least a strong presumption that he had something in mind other than the welfare of the beneficiaries.

Similarly, when Petitioner Kim refused to sign SUB checks when eligibility was clear, being dependent on



eligibility for state unemployment benefits, see, Appendix at A-9, and Kim is the executive secretary of the employer organization, PECA, which was being struck, it is difficult to accept some fanciful rationale that the beneficiaries were not eligible because they were not "employees". See, "Continuation of Trust," Appendix at A-2.

The subsequent payment of the benefits, after the strike was settled, providing the beneficiary waived the right to sue the employer trustees, would indicate something more than mere concern for the terms of the trust agreement. See, 823 F.2d 1341, 1344, Pet. Appendix at A-13.

The legislative history of ERISA makes it clear that it was intended to allow enforcement of fiduciary duties.



In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act, individual participants and beneficiaries will also be able to bring suit in Federal court in such instances, as will as to obtain redress of fiduciary violations. (Emphasis added.)

120 Cong. Rec. 29, 933 (1974) (Statement of Senator Williams).

Respondent Fujikawa was required by ERISA to attempt to remedy the breach. ERISA § 405, 29 U.S.C. § 1105, relating to liability for the breach of co-fiduciary, states in pertinent part:

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the



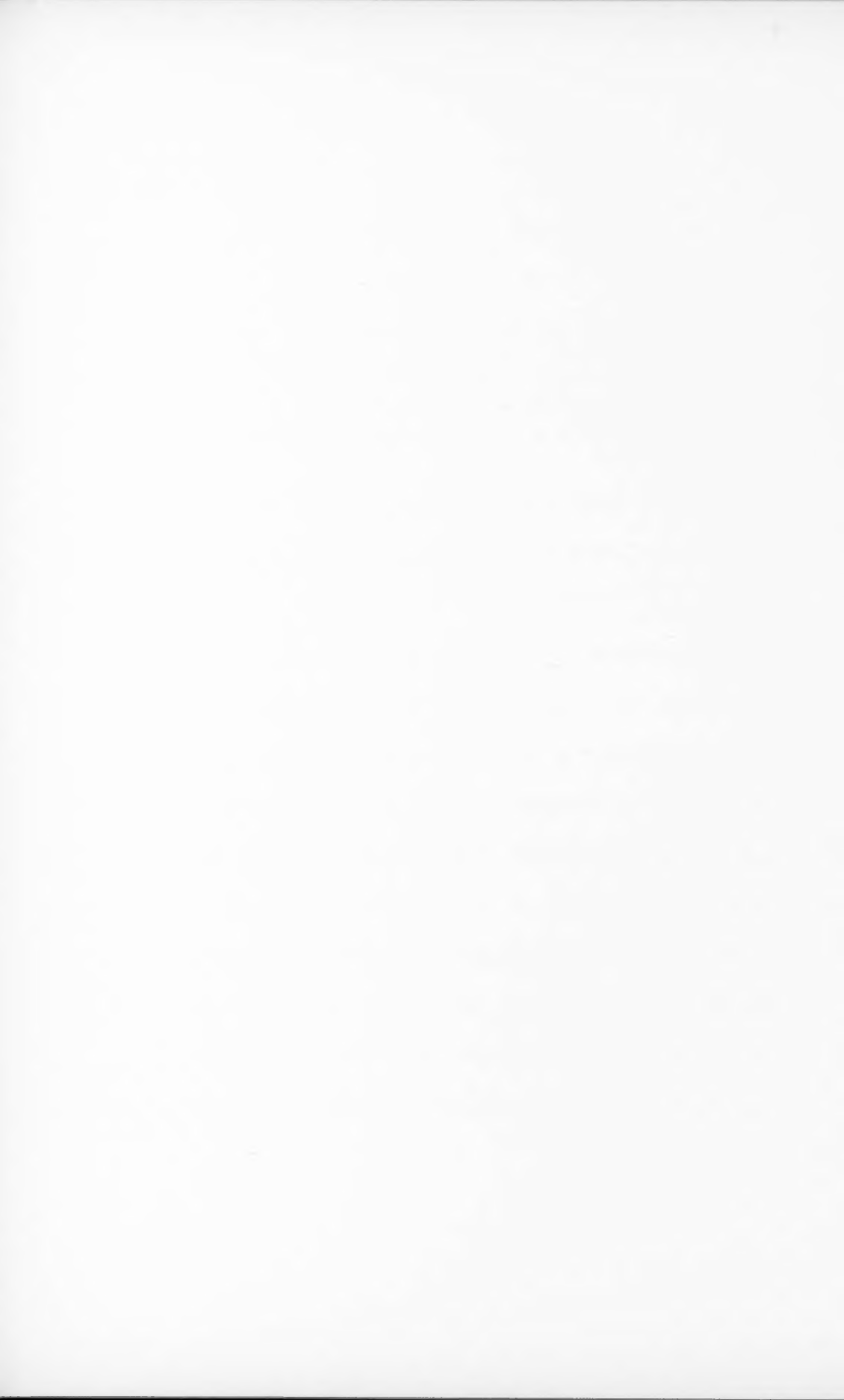
same plan in the following circumstances:

* * *

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

This duty was recognized by the Ninth Circuit. 823 F.2d 1346, Pet. Appendix at A-26.

In short, it would seem fairly obvious that Petitioners here would shroud their blatant use of ERISA trust funds as a strike weapon in the mists of arbitrability and thus escape being held accountable for a violation of the statute. This process has the additional benefit to the employers of preventing any immediate injunctive remedy as well as reducing or eliminating the risk of



judicial sanctions when they use the same tactic in a subsequent labor dispute.

We find it hard to believe that ERISA was enacted with this result in mind.

B. The various circuits have recognized the difference between judicial enforcement of statutory rights and arbitration of the meaning of contracts or trust documents.

The Ninth Circuit has recognized this difference in two recent cases, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984). In Amato, cited by Petitioners, the Ninth Circuit required arbitration where the central question was the amount of pension credits due a claimant who had a break-in-service.

In Amaro, not cited by Petitioners, the Ninth Circuit allowed judicial



enforcement of statutory rights under ERISA § 510, 29 U.S.C. § 1140, where the issue was laying off employees in order to prevent their obtaining necessary years of service to qualify for pension and welfare benefits. The Court clearly separated statutory from contractual rights and stated that to hold otherwise would mean that an ERISA claim

" . . . could be defeated without the benefit of the protections inherent in the judicial process." (Cites omitted.)

724 F.2d at 750.

The Ninth Circuit, citing the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), also observed that:

The resolution of statutory issues "is a primary responsibility of the courts," not arbitrators.

The Ninth Circuit went on to point out:

Section 502 of ERISA, 29 U.S.C. Section 1132, which provides for civil enforcement of the Act, is silent on the exhaustion doctrine being a prerequisite to an ERISA action.

724 F.2d at 750.

This vital distinction has been observed by other circuits as well.

The Third Circuit, one of those cited by Petitioners as being contrary to the Ninth Circuit, Petition at 11, n.4, made a similar distinction in Delgrosso v. Spang & Company, 769 F.2d 928 (3d Cir. 1985). There the court found that participants in a pension plan who sought to prevent the diversion of surplus assets by the company, could sue under ERISA without exhausting the arbitration remedy, even though the question turned



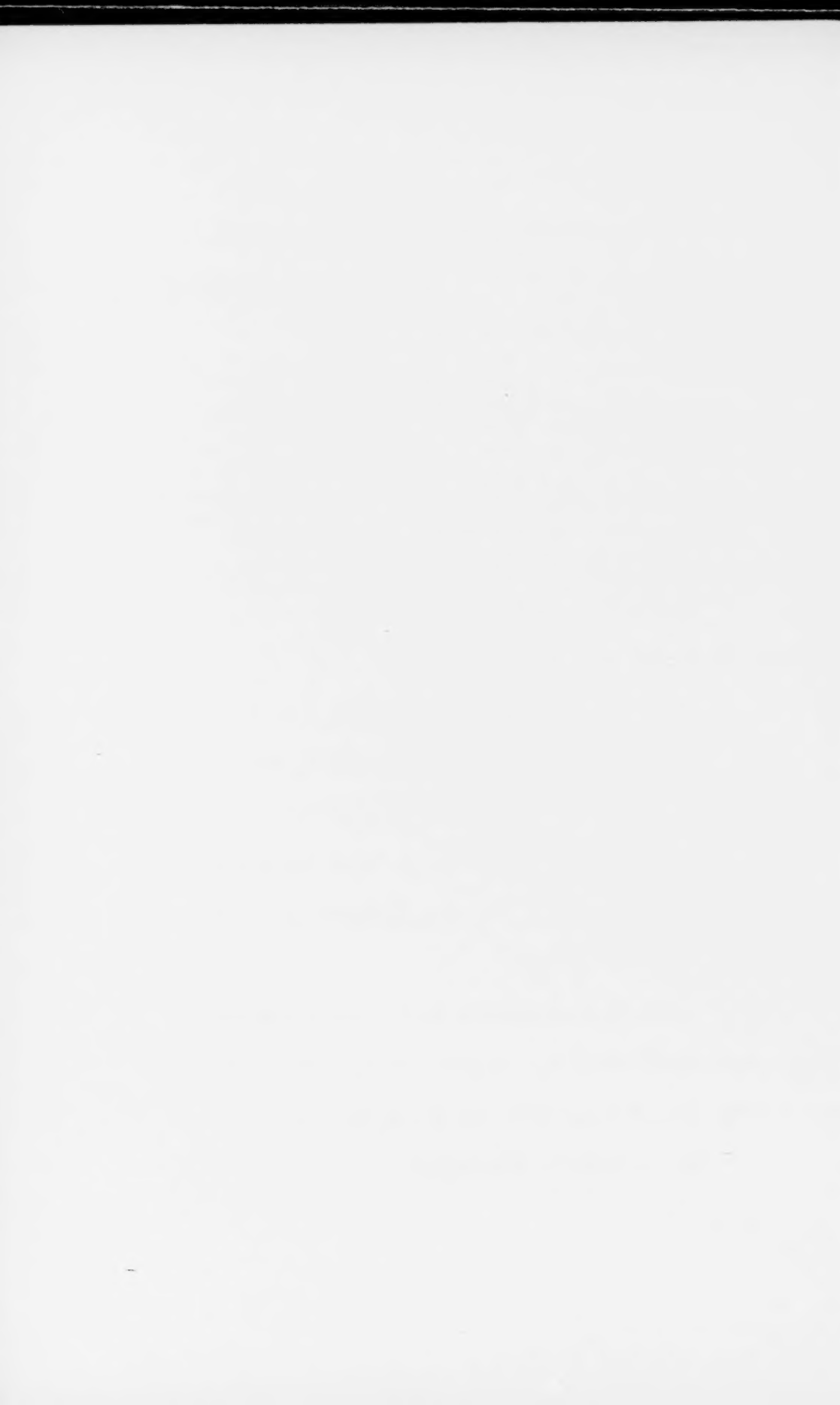
on an interpretation of the pension agreement. 769 F.2d at 932. The Third Circuit went on to observe:

Because the reach of the arbitration clause cannot encompass the claims made by Delgrosso, Delgrosso cannot be compelled to exhaust contractual arbitration remedies under the Pension Agreement and Delgrosso may properly seek relief in the federal courts.

769 F.2d at 933.

We submit that Delgrosso is on all fours with the Ninth Circuit's ruling in the present case. Incidentally, certiorari was denied by the Supreme Court. Spang & Co. v. Delgrosso, 476 U.S. 1140 (1986).

This distinction between statutory and contractual rights was also upheld by the Third Circuit in another case cited by Petitioners, Barrowclough v. Kidder,



Peabody & Co., Inc., 752 F.2d 923

(3d Cir. 1985).

Similarly, in Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276 (3d Cir. 1984), the Third Circuit, though requiring arbitration of whether the employer was required to continue payment of premiums for a hospitalization plan during a strike, recognized the distinction between statutory and contractual rights, and distinguished the Supreme Court's decision in Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984).

We also suggest that Petitioners' citation of Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984), is inappropriate. The court there required "claim" exhaustion, but went on



to find, under ERISA, that the trustees' action in denying the claim was arbitrary and capricious.

In our case, Respondent is not making a "claim"; he is raising the statutory question of breach of fiduciary duties by the employer trustees.

Petitioners would also show a conflict with the Ninth Circuit by citing a Fifth Circuit case, Denton v. First National Bank of Waco Texas, 765 F.2d 1295 (5th Cir. 1985). We suggest this is less than accurate. In Denton, the claimant was seeking a lump-sum payment of his pension benefits. The Fifth Circuit, citing the Ninth Circuit in Amato, and the Second Circuit in Morse v. Stanley, 732 F.2d 1139 (2d Cir. 1984), found that the court should not intervene

in this type of case unless the action of the trustees was arbitrary and capricious. This hardly seems inconsistent with the Ninth Circuit, particularly since they cite Amato. Further, the Fifth Circuit in Denton recognizes the same distinction between the statutory enforcement of fiduciary duties and the trustees' right to interpret the contract in a claim case. 765 F.2d at 1301.

Petitioners then move to the Seventh Circuit and cite Challenger v. Local 1, International Bridge, Structural & Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980). This case involved the interpretation of a break-in-service provision in a pension plan, with no allegation of any breach of fiduciary

duties under ERISA. We suggest this is an inappropriate citation, given the facts and allegations of the present case.

After citing the Ninth Circuit Amato case, Petition at 12, n.4, to show differences of other circuits with the Ninth Circuit, Petitioners make their final citation Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985). Mason was a suit over closing of a plant, alleging violation of a contract and the union's failure to represent. The complaint was subsequently amended to claim that the employer violated ERISA by using certain computer programs in connection with its pension plan. No grievances were filed under the contract, or under the pension plan procedures.

The court required prior exhaustion of procedures under the contract and the pension plan, citing the Seventh Circuit in Kross v. Western Electric, 701 F.2d 1238 (7th Cir. 1983) and the Ninth Circuit in Amato. The court noted the Ninth Circuit's distinction in Amaro. Mason, 763 F.2d at 1226. The Supreme Court denied certiorari in this case. Mason v. Continental Group, Inc., 474 U.S. 1087 (1986).

We fail to understand how Petitioners can claim that Mason, with widely different facts, can set up a conflict with the Ninth Circuit, when Mason relies on Amato, a Ninth Circuit case.

We suggest that the Petitioners' attempt to justify a writ of certiorari in this case is less than convincing.

C. The Ninth Circuit's position in the present case is consistent with those taken by the Supreme Court in similar cases.

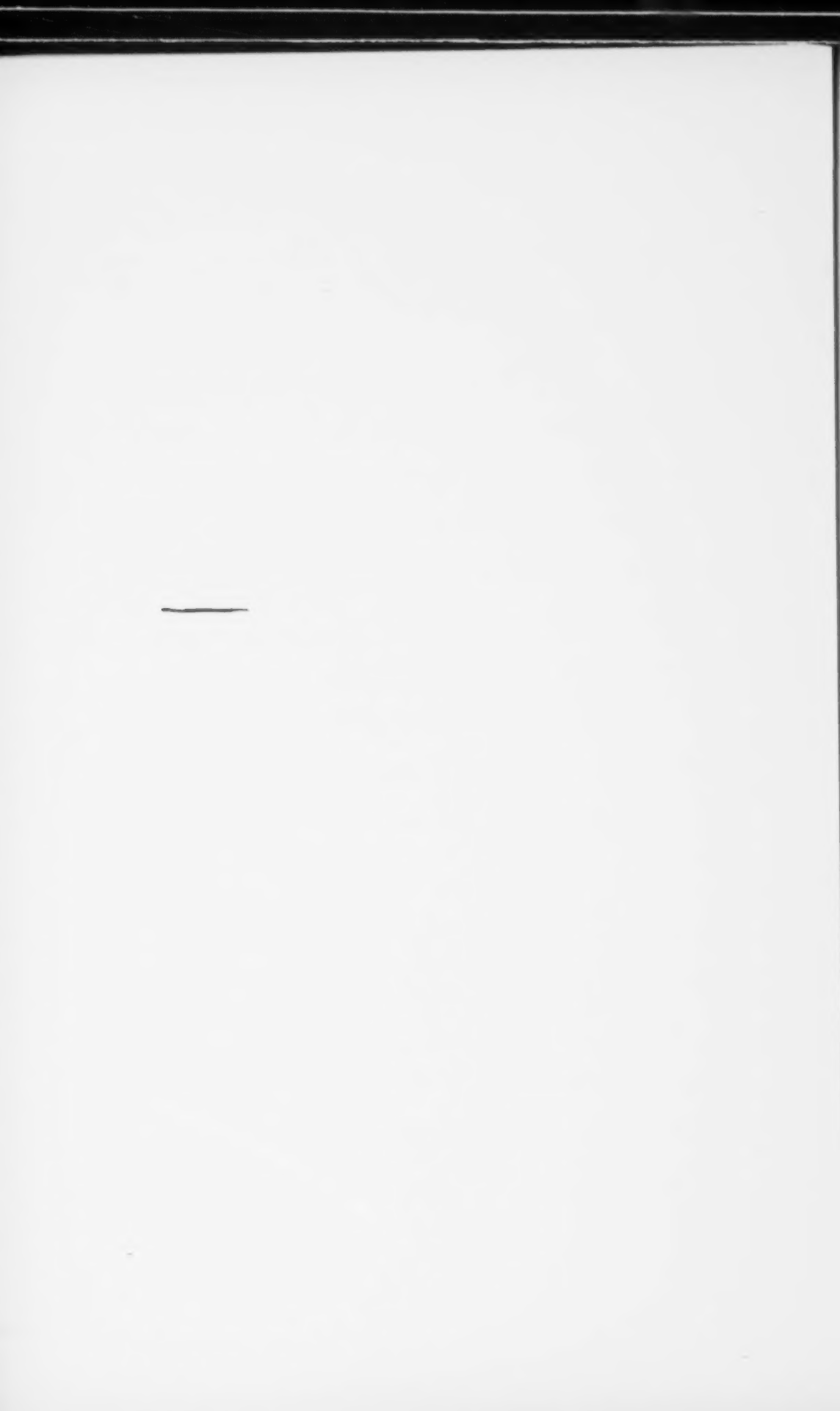
It would be presumptuous to cite the Supreme Court to itself, and we do not intend to do so. However, this Court has given ample guidance in the past to the basic concepts which are involved in the present case.

In NLRB v. Amax Coal Co., 453 U.S. 322 (1981), this Court pointed out the necessary separation between the duties of a trustee and those of the appointing party.

In sum, the duty of the management-appointed trustee of an employee benefit fund under section 302 (c)(5) is directly antithetical to that of an agent of the appointing party.

453 U.S. at 331-32.

The language and legislative history of Section 302 (c)(5) and ERISA therefore demonstrate



that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.

453 U.S. at 334.

In the present case, these admonitions seem to have escaped the Petitioners.

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), this Court made clear that an employee's statutory rights - in that case under Title VII of the Civil Rights Act - were distinctly separate from that employee's contractual rights, including arbitration. We suggest a similar right to court enforcement of fiduciary duties under ERISA should be upheld in the present case.

In Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), this

Court applied a similar rule to the statutory rights given employees under the Fair Labor Standards Act. 29 U.S.C. § 201, et seq. Those rights could not be subjected to contractual arbitration. The Court made its basic distinction between contractual and statutory rights:

Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

450 U.S. at 737.

More recently, in Schneider Moving & Storage, 466 U.S. 364 (1984), this Court

did not apply the "presumption of arbitrability" to disputes between trustees and employers, even if those disputes raised questions of interpretation under the collective bargaining agreements. 466 U.S. at 372. While Schneider dealt with the right of trustees to collect trust fund contributions from employers, and not with the attempt of one trustee to enforce the fiduciary duty provisions of ERISA against another trustee (who was, incidentally, a struck employer), we suggest that the underlying concept of a trustee's right and duty to take legal action to protect the trusts without being subjected to arbitration, is similar. See Appendix at A-1.

Similarly, in Clayton v. Automobile Workers, 451 U.S. 679 (1981), this Court

did not require an employee to exhaust internal union appeal procedures which were inadequate to award the full relief sought under § 301 of the LMRA, or would unreasonably delay a judicial hearing on the merits of his case. In the present case, all an arbitration proceeding would have achieved was delay so that the employers could succeed in using the trust funds as a strike weapon. Even if ultimately successful, those procedures would not have granted the injunctive and equitable relief required to prevent future misuse of the funds by the employer trustees, such as could now occur under the currently expired contract.



CONCLUSION

Based on the foregoing, we submit that the decision of the Ninth Circuit in this case was not in conflict with rulings in other circuits, and is in accord with prior holdings of this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

GILL PARK PARK & KIM
Attorneys at Law

A handwritten signature in dark ink, appearing to read "Thomas P. Gill", is written over a horizontal line.

THOMAS P. GILL
(Counsel of Record)
T. ANTHONY GILL

Attorneys for Respondent
Thomas Fujikawa



APPENDIX A

PECA-IBEW VACATION & HOLIDAY FUND
DECLARATION OF TRUST AGREEMENT

ARTICLE VI

Duties and Powers of Trustees

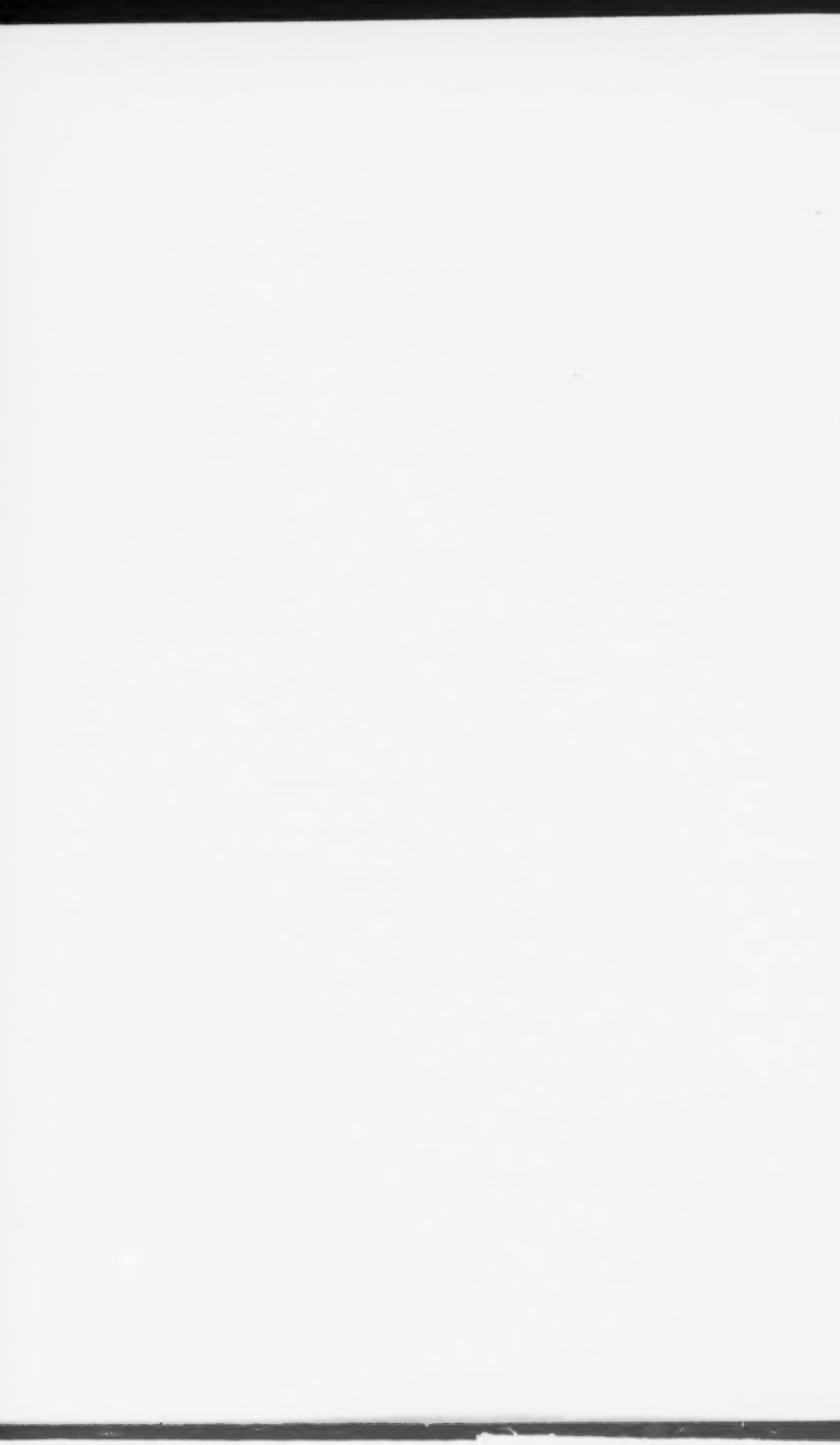
* * *

Section 2 Powers. Except as otherwise
provided by law, the trustees may:

* * *

o. Maintain Legal Proceedings.

Delegate their authority to the Administrator or any authorized representative to maintain any legal proceedings necessary to protect the trust or the trustees or to secure payment of Employer contributions and liquidated damages for the trust or to effectuate the administration of the trust or the plan or to secure benefits contemplated hereby. In connection



therewith, the trustees or their administrator or representative may compromise, settle or release claims on behalf or or against the trust and/or the trustees;

* * *

ARTICLE X

Termination or Merger

Section 1. Continuance of Trust. The parties contemplate that new labor agreements may be entered into from time to time continuing the provisions of employer contributions for trust purposes. This trust shall continue during such period of time as may be necessary to carry out the provisions of the labor agreement. The termination of labor agreements or any of them without the extension or renewal shall not by itself terminate this trust, which shall



continue for a period time sufficient to
wind up the affairs of the trust.

(Emphasis added.)

* * *



APPENDIX B

RULES AND REGULATIONS

PECA-IBEW Vacation and Holiday Plan

Section 1. Definitions: As used herein:

* * *

e. "Labor Agreement" means:

(1) The collective bargaining agreement effective May 1, 1969 between the Union and the Employers, and amendments, extensions or renewals thereof.

(2) Any other collective bargaining agreement between the Union and any employer or employer association which provides for contributions to the Fund.

f. "Employer" means any association, individual, partnership, corporation



or entity which employs employees and is a party to the labor agreement with the Union.

- g. "Union" means Local Union No. 1186 of the International Brotherhood of Electrical Workers, AFL-CIO.
- h. "Employee-Beneficiary" means a person covered by a labor agreement. It may mean a person who works for the Union, the Pacific Electrical Contractors' Association, or the PECA-IBEW Administrative Office, provided such inclusion does not jeopardize the tax-exempt status of the Fund.
- i. "Earning Year" means September 1 of any year to August 31 of the succeeding year during which contributions are accumulated.



- j. "Benefit Year" means September 1 of any year to August 31 of the succeeding year during which benefits are paid.

* * *

Section 8. Payment of Benefits.

- a. Vacation Benefits. Subject to the application of an employee and the approval of the Trustees or its authorized representative, vacation benefits shall be paid to the employee in the Benefit Year when the employee takes his vacation.

(Emphasis added.)

- b. Holiday Benefits. (Eff. 8-15-76) No application for Holiday Benefits is necessary. Holiday Benefits shall be paid once a year to all employees before the month of December.

(Emphasis added.)



Holiday Benefits for employees who are covered under a labor agreement requiring the employer to contribute 11.2% of the gross straight-time wages to the Fund are based on 14 holidays (New Year's Day, President's Day, Kuhio Day, Good Friday, Memorial Day, Kamehameha Day, Fourth of July, Labor Day, Discoverers' Day, Veteran's Day, Thanksgiving Day, day after Thanksgiving Day, Admission Day and Christmas Day.)

Holiday Benefits for employees who are covered under a labor agreement requiring the employer to contribute 7.2% of the gross straight-time wages to the Fund are based on 8 holidays (excluding Kuhio Day, Good Friday, Discoverer's Day, day after

Thanksgiving Day and Veteran's Day
from the above-listed holidays).

* * *

PECA-IBEW SUPPLEMENTARY
UNEMPLOYMENT BENEFIT PLAN

(as amended)

* * *

ARTICLE III. BENEFITS AND ELIGIBILITY

Section 1. Eligibility for
Supplementary Unemployment Benefit. An
Employee shall be eligible for a
Supplementary Unemployment Benefit when
he has met all of the following
requirements:

- a. He has registered at and has
reported to an unemployment office
maintained by the State
Unemployment Benefit Program.
- b. He has, within six weeks from his
unemployment registered with the

referral agent as provided by the Labor Agreement and has not failed or refused to accept employment for a job covered by such Agreement which may be offered by such agent.

- c. He is involuntarily separated from employment with his Employer as determined by the Rules & Regulations established by the Trustees, or he has received the State Unemployment Benefit, or he has received a certification that he is entitled to such Benefit for the week unless he has received the maximum benefit allowable under the State System whereupon only a. and b. above will apply. (Emphasis added.)

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN GUSHIKEN, ETC., ET AL., PETITIONERS

v.

THOMAS FUJIKAWA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

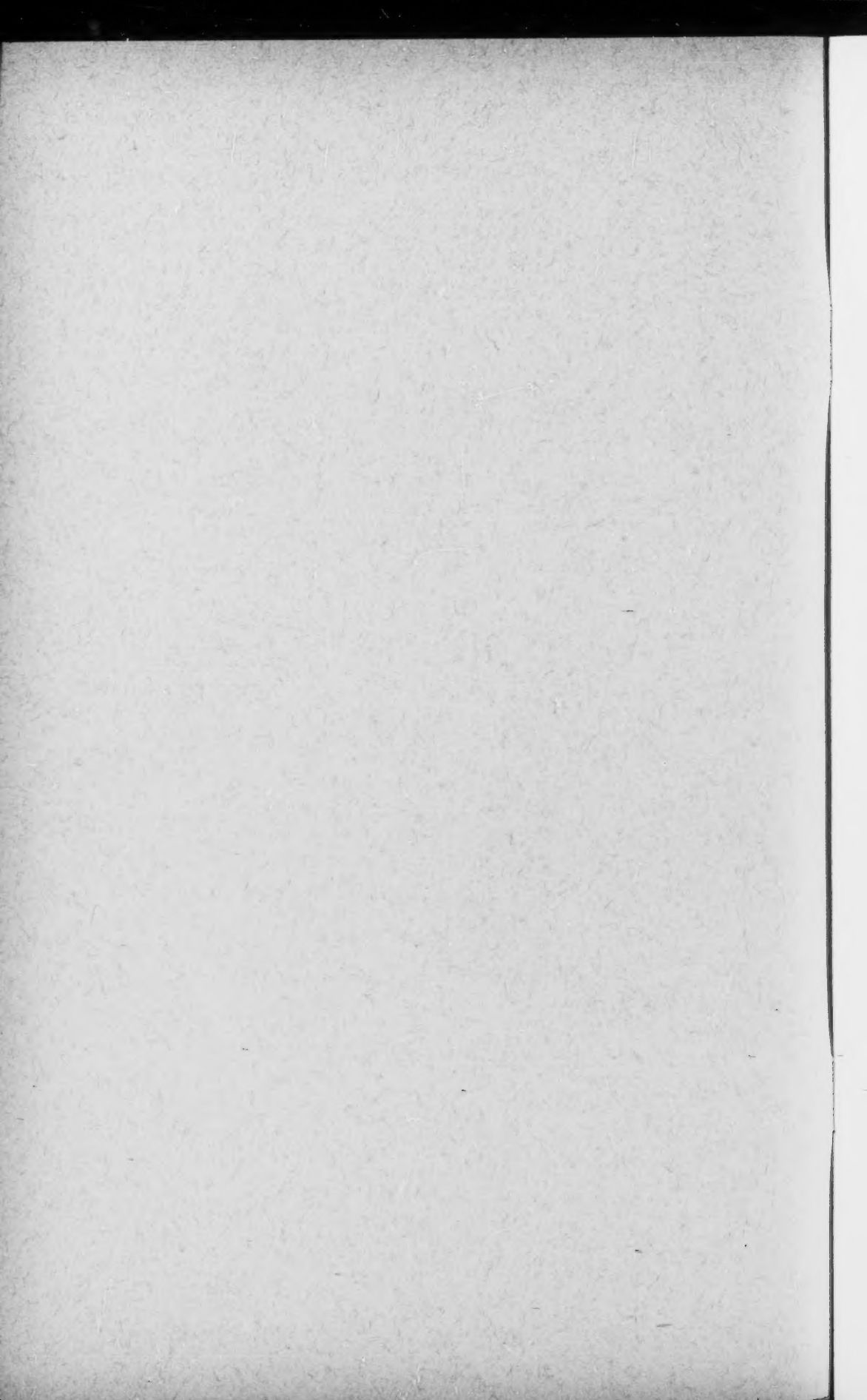
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QUESTIONS PRESENTED

1. Whether a trustee of an employee benefit plan may, without first submitting the issue to the plan as a claim for benefits, sue his co-trustees in federal court, alleging that they breached their fiduciary duties under Section 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104(a), by stopping benefit payments to plan participants and beneficiaries during a strike against the employers who appointed them.

2. Whether a trustee may bring such an ERISA suit where the plan is established jointly by employer and employee organizations and has procedures for resolving trustee deadlocks on the administration of the plan, but the trustee has not exhausted these procedures.

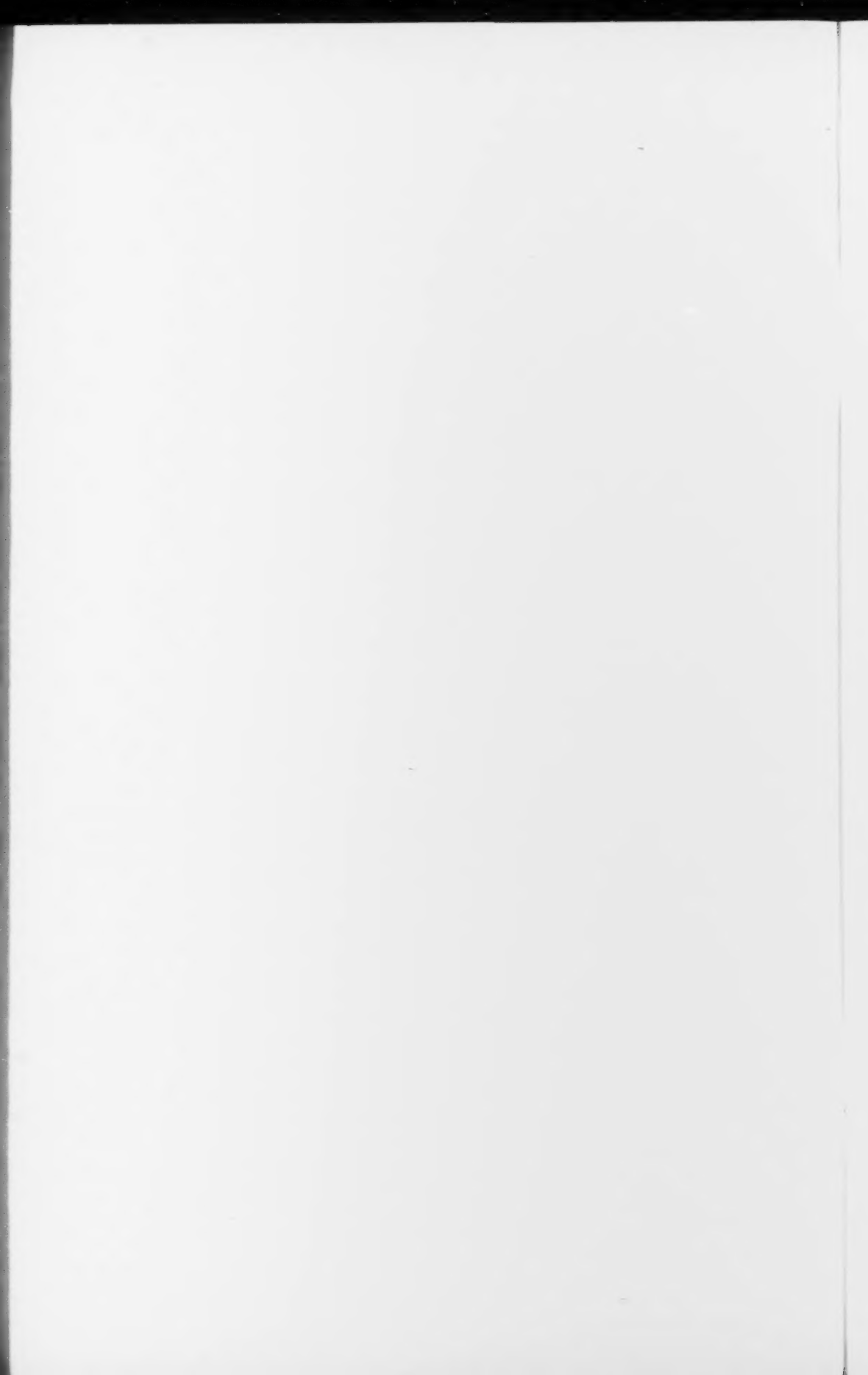


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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1302

JOHN GUSHIKEN, ETC., ET AL., PETITIONERS

v.

THOMAS FUJIKAWA, ETC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners—John Gushiken, Rodney Kim and Nick Teves—are three employer-appointed trustees of several employee benefit plans¹ that a multi-

¹ Each plan had an equal number of trustees appointed by the employer and by the union. Pet. App. A9.

employer group, the Pacific Electrical Contractors Association (PECA), and the International Brotherhood of Electrical Workers (IBEW) established pursuant to Section 302(c) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(c) (Pet. App. A8-A9).² The purpose of these plans is to provide supplemental unemployment, training, vacation, holiday, and other benefits to eligible employees (Br. in Opp. App. A4-A9). Section 404 (a) (1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104(a) (1), requires, among other things, that the plans' trustees discharge their duties "solely in the interest of the participants and beneficiaries[,] * * * for the exclusive purpose of * * * providing benefits * * *." As required by Section 302(c) of the LMRA, the plans provide for arbitration to resolve deadlocks between the employer-appointed and union-appointed trustees on the administration of the plans (Pet. App. A98-A99). As required by Section 503 of ERISA, 29 U.S.C. 1133, and Department of Labor regulations (see Pet. App. A76-A92), they also establish procedures by which participants or beneficiaries or persons claiming under them may obtain review of denied claims for benefits (*id.* at A93-A98).

In 1984, following the expiration of a collective bargaining agreement and during a four-month

² Section 302(c) (5) (B) of the LMRA allows employers to contribute money to an employee benefit trust fund, subject to certain statutory requirements, among them that the fund be used only for specified benefits which are paid on the basis of a written agreement between an employer and a union. Employees and employers must be equally represented in the administration of the fund. 29 U.S.C. 186(c) (5) (B); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328-329 (1981).

strike, petitioner Kim, who is also the Executive Secretary of PECA, instructed the plans' administrative office to stop paying benefits pending a meeting of the trustees to decide what benefits should be paid during the strike (Pet. App. A11-A12). The plans' administrator, who had depended on trustee signature or approval for certain benefit payments,³ complied with Kim's instruction (*id.* at A12). During the strike, petitioners Kim and Gushiken refused to sign benefit checks, and petitioner Teves instructed the administrative office not to approve requests for loans based on financial hardship (*id.* at A12-A13).⁴ After the strike ended and a new collective bargaining agreement was ratified, petitioners resumed signing benefit checks for participants and beneficiaries who waived their right to sue the trustees for failure to pay benefits during the strike (*id.* at A13).

While the strike was in progress, respondent Fujikawa, a union-appointed trustee of the plans, sued petitioners in federal district court. He alleged that they had breached their fiduciary duties to the plans and their accompanying duty to act solely in the best interests of the plans' beneficiaries by refusing to sign or approve benefit checks to striking workers,

³ The practice was to have both an employer-appointed and a union-appointed trustee sign checks for supplemental unemployment or training and vacation benefits (Pet. App. A10). Computerized signatures authorized payment of health and welfare benefits and supplemental unemployment benefits under \$500, and a custodian bank directly disbursed annuity and pension benefits that the trustees approved (*id.* at A11).

⁴ Petitioners apparently continued these practices after counsel for the plans issued an opinion concluding that when a labor agreement expires the affected plan continues to operate as needed to wind up its affairs and must pay benefits during the winding up period (Pet. App. A39; Br. in Opp. 6).

which strengthened PECA's bargaining position in its negotiations with the IBEW (Pet. App. A13-A14). Respondent did not invoke either the plans' procedures for submitting benefit claims or the LMRA-required arbitration procedures for resolving trustee deadlocks before filing this suit.

2. The district court dismissed respondent's suit on the ground that he had failed to exhaust the plan procedures under which a participant or beneficiary could challenge a denial of benefits (Pet. App. A40-A42). The court construed respondent's ERISA claim as one for benefits and found that his status as a fiduciary, rather than a participant or beneficiary, did not bar the applicability of these plan procedures (*id.* at A42).

3. The court of appeals reversed. Initially, the court noted that the denial of benefits to striking workers weakens the ability of a union and its members to withstand prolonged economic conflict and that the order by employer-appointed trustees to change the practices of paying benefits after the strike began raised a substantial question about whether these trustees ordered the change to improve the employers' bargaining position (Pet. App. A17-A18). Because petitioners' counsel conceded at oral argument that the plans' provision governing challenges to individual eligibility determinations did not apply to respondent, the court did not discuss further the district court's finding that exhaustion of these procedures was required (*id.* at A18-A19).

The court also rejected petitioners' argument that respondent had to exhaust the arbitration procedures that Section 302(c)(5)(B) of the LMRA requires to be pursued in the event of a deadlock among the

trustees. In accordance with that Section, the trust agreement between PECA and the IBEW provides that when the employer-appointed and union-appointed trustees disagree in disputes over the administration of the plans, a neutral umpire, *i.e.*, an arbitrator, must resolve the deadlock (Pet. App. A22-A23, A99). Referring to its previous decision in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), which found no requirement of exhaustion of contractual grievance procedures prior to a federal court suit alleging solely a violation of a protection afforded by ERISA Section 510,⁵ the court concluded "that plaintiffs suing for violation of an ERISA statutory provision * * * have a direct right to sue in federal court, without regard to" internal dispute resolution procedures (Pet. App. A20-A21). This rule applies, the court stated, whether the dispute procedure is established by contract or by the LMRA requirements (*id.* at A22).

The court of appeals also concluded that, in any event, the LMRA's arbitration requirement does not apply to respondent's claim (Pet. App. A22-A25). That requirement applies to trustee deadlocks over "'administration of [the] fund,'" which the Ninth and Second Circuits have interpreted to mean operation of the funds "under the trust instrument" (*id.* at A23) or disputes on issues "that the trustees have authority to decide by virtue of the terms and provisions of the trust agreements" (*id.* at A24, citing, *inter alia*, *Mahoney v. Fisher*, 277 F.2d 5 (2d Cir. 1960) and *Barrett v. Miller*, 276 F.2d 429 (2d Cir.

⁵ Section 510, 29 U.S.C. 1140, prohibits, among other things, interference with the attainment of rights to which a participant or beneficiary may become entitled under an employee benefit plan.

1960)). The court found it clear that disputes over statutory duties are not included in these interpretations of Section 302(c)(5)(B) of the LMRA (Pet. App. A24). Even under the "‘broad interpretation’" of the statutory language, reading all disputes as involving "‘administration of [the] fund’" except those in which the trustees attempted to exceed their powers under the trust, the court concluded that respondent was not required to utilize the arbitration procedures (*id.* at A24-A26). Respondent’s allegation that petitioners represented the employers who appointed them rather than the plan’s beneficiaries states a claim that these trustees acted in a way that "clearly exceeds" their power, the court concluded (*id.* at A25).

In remanding the case, the court of appeals directed the district court to consider whether referral of the matter to an umpire might assist its decision-making process in any way, and to make such a referral if appropriate (Pet. App. A33). Although it said that petitioners’ argument that strikers were not employees appeared to be frivolous (*ibid.*), it noted certain ways in which such a referral might be of assistance (*id.* at A33-A34), and made clear that "on remand the district court may, in its discretion, refer the matter to an umpire, to reconsider Fujikawa’s motion for summary judgment or consider such other appropriate motion as the parties make" (*id.* at A34-A35).

DISCUSSION

The court of appeals’ decision is correct in concluding that respondent was not required to exhaust plan procedures relating to claims for benefits, since such procedures are available only to claimants and not

to trustees. With regard to its rejection of the asserted requirement that respondent exhaust the LMRA's deadlock procedure, the legal question is, as set forth below, somewhat more difficult. However, because the court remanded to the district court for further consideration of a referral to arbitration, the issue is not, in any event, ripe for review by this Court.

1. Although petitioners assert that the decision of the court below conflicts with decisions of other courts of appeals requiring exhaustion of plan remedies before bringing suit on a claim for benefits,⁶ they quite correctly conceded below that respondent had no plan remedies to exhaust (Pet. App. A18-A19). The plan, consistent with regulatory require-

⁶ We agree that there is a conflict in the circuits over the scope of the exhaustion requirement as applied to claims for benefits. The Third and Ninth Circuits have distinguished actions brought to assert statutory rights, for which exhaustion is not required, from claims for benefits under a plan, for which exhaustion is required. See Pet. App. A20; *Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985); *Zipf v. AT&T*, 799 F.2d 889 (3d Cir. 1986); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), cert. denied, No. 86-1659 (Dec. 7, 1987); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

The Seventh and Eleventh Circuits, in contrast, have required the exhaustion of plan remedies before a plaintiff may bring a suit for infringement of rights under ERISA. See *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 465-467 (7th Cir. 1986), cert. denied, No. 86-933 (Jan. 27, 1987); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1243-1245 (7th Cir. 1983); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1224-1227 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). Cf. *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, No. 86-1546 (8th Cir. Apr. 6, 1988) (enforcing agreement to arbitrate ERISA claims in suit alleging mismanagement of pension and profit sharing accounts).

ments, provides for review of claims submitted by an "employee or beneficiary or person claiming under them" (Pet. App. A93; 29 C.F.R. 2560.503-1(a)). But a trustee is not an employee or beneficiary, and has separate duties to the plan as a whole. See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *id.* at 151 (Brennan, J., concurring). And respondent did not make a claim for benefits, but rather sought to compel petitioners to perform their fiduciary duties as enunciated in ERISA by pursuing the statutory remedy created for that purpose (§ 502(a)(3), 29 U.S.C. 1132(a)(3)). Because respondent was not pursuing a claim for benefits "under" an employee or beneficiary, he was not entitled to utilize the plan claim review procedures.⁷

2. While not subject to such categorical analysis, the court of appeals' conclusion that respondent was not necessarily required to exhaust the LMRA's procedures for arbitration of deadlocks also does not merit this Court's attention. In the first place, there

⁷ Indeed, respondent, a trustee, had no right to sue for benefits under ERISA. See Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (participant or beneficiary—not trustee or Secretary of Labor—is authorized to bring civil actions to recover benefits).

The absence of applicable plan remedies makes this case like *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972). There the question presented was whether exhaustion of a collective bargaining grievance procedure was required before bringing suit under the Fair Labor Standards Act to recover overtime compensation. This Court dismissed the petition in *Iowa Beef Packers* as improvidently granted after learning at oral argument that there were no procedures to exhaust because the grievance procedure was limited to the resolution of alleged violations of the collective bargaining agreement (*id.* at 229-230).

is much to be said for the court's view that allegations of ERISA violations by plan trustees may proceed directly to court, with exhaustion limited to that which the district court finds appropriate as a matter of discretion.

Congress intended claims alleging violations of provisions of ERISA to be within the "exclusive jurisdiction" of federal courts. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); see also 120 Cong. Rec. 29933 (1974) (statement of Sen. Williams). This exclusive federal court jurisdiction implements Congressional intent that ERISA's enforcement provisions would "remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities." S. Rep. 93-127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1 Staff of the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 621 (Comm. Print 1976) (*Leg. Hist.*); H.R. Rep. 93-533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 2 *Leg. Hist.* 2364.⁸ Moreover, ERISA is a statute designed to provide minimum standards to protect the interests of individual workers. See Section 2(a), 29 U.S.C. 1001(a); *Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559,

⁸ The legislative history suggests that Congress, in enacting ERISA, intended to provide more effective remedies than those available under the LMRA. See S. Rep. 93-127, *supra*, at 4, *reprinted in* 1 *Leg. Hist.* 590; H.R. Rep. 93-533, *supra*, at 4, *reprinted in* 2 *Leg. Hist.* 2351. See also *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982) (It is an open question whether Section 302(c)(5) of the LMRA provides statutory remedies for breach of fiduciary duty claims.).

569-570 (1985); S. Rep. 93-127, *supra*, at 5, *reprinted in* 1 *Leg. Hist.* 591; H.R. Rep. 93-533, *supra*, at 11-12, *reprinted in* 2 *Leg. Hist.* 2358-2359. In such a context, this Court has repeatedly recognized that the policies favoring arbitration are less persuasive. *Atchison, T. & S.F. Ry. v. Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 7-8; *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743-745 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974); cf. *Lingle v. Norge Div. of Magic Chef, Inc.*, No. 87-259 (June 6, 1988), slip op. 11-12. Enforcement of the standards set forth in ERISA is furthered by the court of appeals' approach rejecting any automatic requirement of exhaustion of the LMRA arbitration remedy in favor of making such referral a matter for the district court's discretion.

At the same time, it may be argued that arbitration is appropriate prior to litigation because respondent's claim is related to, though not necessarily dependent on, the underlying issue of entitlement to benefits under the plan.⁹ Section 302(c)(5)(B) is seemingly mandatory in requiring referral to an

⁹ Respondent contends, by his action under Section 502 (a) (3) of ERISA, 29 U.S.C. 1132(a) (3), that petitioners, his co-trustees, breached their fiduciary duty as trustees to act solely in the interest of the plan and its beneficiaries when they stopped benefit payments during a strike (Pet. App. A13). Petitioners defend by alleging they acted in accord with plan documents. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 334-335 (3d Cir. 1984), indicates that when fiduciaries act for impermissible motives or imprudently create disputes subject to the LMRA deadlock procedures, they violate ERISA fiduciary duty requirements, regardless of whether their acts are inconsistent with plan terms.

umpire where the trustees deadlock over a matter of administration of the fund. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 (1981). It is therefore not clear that the statute is best read, in the manner of the court of appeals, to exclude allegations of trustee conduct in excess of authority, at least where the allegations include, as here, issues of plan interpretation. Further, in this case, the trust agreement arguably expanded on the language of the statute to require referral to an umpire of deadlocks on "any matter." See Pet. App. A99. It is a substantial step, which the Court has not always been willing to take, to conclude that a considered agreement to arbitrate should be set aside in favor of an exclusive judicial remedy. See *Shearson/American Express, Inc. v. McMahon*, No. 86-44 (June 8, 1987), slip op. 4-6.

The court of appeals' approach is also in some tension with the decision of the Court of Appeals for the Second Circuit in *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, cert. denied, 479 U.S. 915 (1986), which also involved an exhaustion issue under the LMRA's deadlock provision. In *Alfarone*, union and management trustees were deadlocked over whether the employer owed certain benefit contributions under the collective bargaining agreement, and whether suit should be filed to recover them (788 F.2d at 78). The union trustees proceeded directly to court, seeking to compel the employer to make the benefit contributions, and alleging that the management trustees breached their ERISA fiduciary duties by not joining as plaintiffs in the suits (*id.* at 77-78). The court of appeals required exhaustion of the arbitration remedy on the question of whether to sue under the trust agreements for the contributions. It noted (*id.* at 79) that the plans

“expressly provided a remedy for deadlock among the trustees on the question whether to sue under the trust agreements for contributions,” and concluded that to allow the action to proceed without referral to arbitration “would violate the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases. See *Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983).”

While *Alfarone* is thus contrary in spirit to the approach of the court of appeals in this case, it is not in conflict. Elsewhere in the opinion, the court in *Alfarone* ruled that the management trustees had not breached their fiduciary duty in refusing to join in the suit to recover benefit contributions (788 F.2d at 80). Having rejected on the merits the statutory ERISA claim, all that remained was the underlying question of contract interpretation. The court of appeals in this case made clear (Pet. App. A23) that, in such a context, it would agree that exhaustion is required. See *Amato v. Bernard*, 618 F.2d 559, 561 (9th Cir. 1980).

In any event, this case does not merit review by this Court at the present time because of its current procedural posture. The court of appeals remanded to the district court with instructions to “consider whether its decision-making process would be aided in any way were it to direct that the dispute be submitted to an umpire and, then, receive a copy of his decision” (Pet. App. A33). The district court is thus to consider further the issue of arbitration referral presented in the petition. It is unclear whether respondent will, in fact, be required to resort to arbitration on plan-related issues before proceeding further with his claim of a fiduciary breach under ERISA. Should such referral be denied, peti-

tioners will have ample opportunity to renew their present contentions, along with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Review at the present time would therefore be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988